

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917

No. 296

**MARY E. GILLIS, ADMINISTRATRIX OF THE ESTATE OF
ALEXANDER J. GILLIS, PLAINTIFF IN ERROR,**

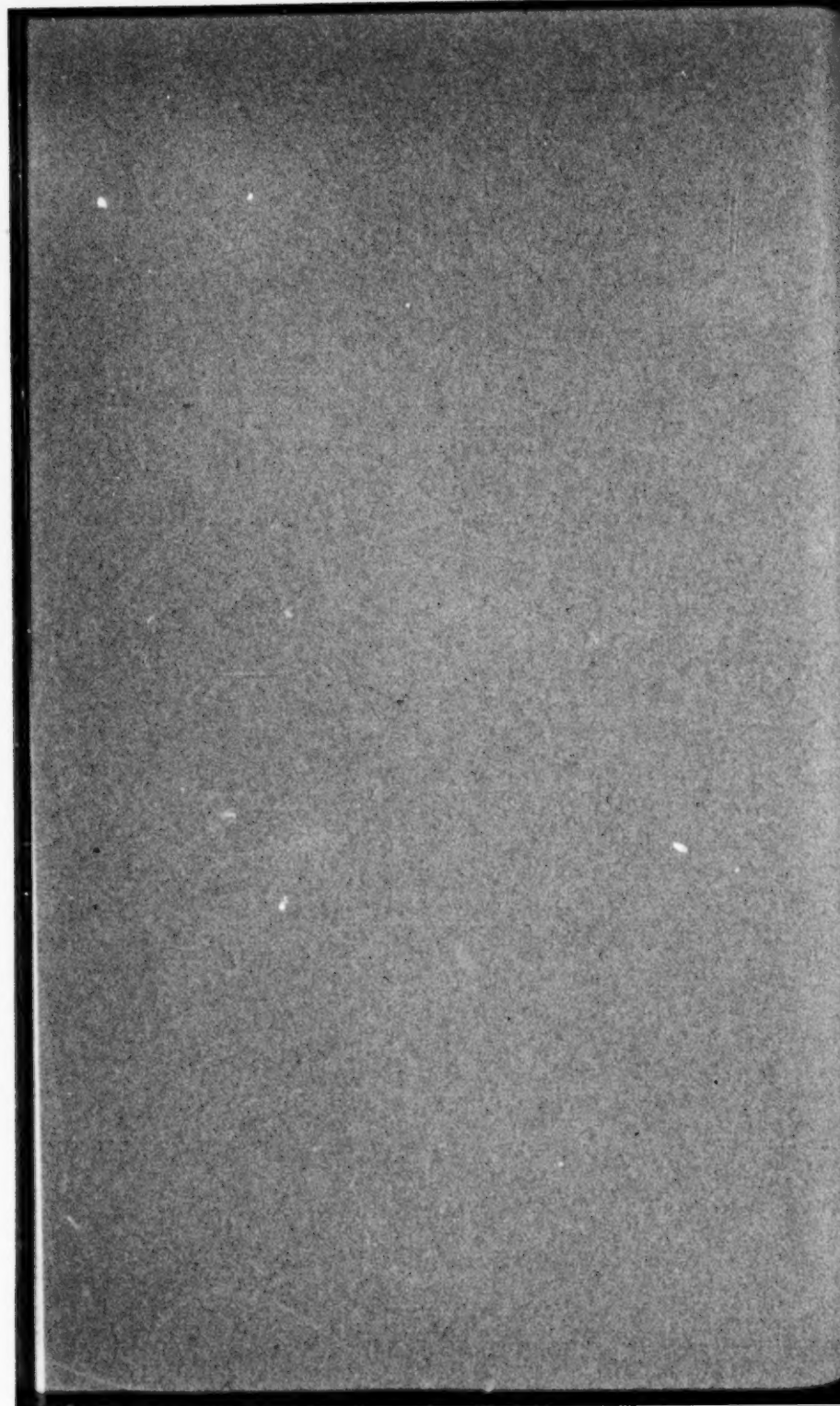
vs.

**NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY.**

**IN ERROR TO THE SUPERIOR COURT OF THE STATE OF
MASSACHUSETTS.**

FILED NOVEMBER 10, 1917.

(26,225)



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a UNITED STATES OF AMERICA, ss:

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a pleawhich is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Mary E. Gillis, administratrix of the estate of Alexander J. Gillis, Plaintiff, and New York, New Haven and Hartford Railroad Company, Defendant, in an action of tort wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff as by her complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of December, in the year of our Lord one thousand nine hundred and sixteen.

WILLIAM NELSON,

Clerk of the District Court of the United States,

District of Massachusetts.

Allowed by

JOHN A. AIKEN,

Chief Justice of the Superior

Court of Massachusetts.

b COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Francis A. Campbell, Clerk of said Superior Court have hereto set my hand and the seal of said Court this tenth day of January, A. D. 1917.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

[Endorsed:] 72583. (11.) Writ. Superior Clerk's Office.
Filed Dec. 23, 1916. Francis A. Campbell, Clerk Superior Court.

c COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 67 inclusive of the files, records, and proceedings of the said Superior Court, is in due form.

In Testimony Whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this tenth day of January in the year of our Lord one thousand nine hundred and seventeen.

[Seal the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

d COMMONWEALTH OF MASSACHUSETTS
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John

A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this tenth day of January, in the year of our Lord one thousand nine hundred and seventeen.

[Seal the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye,

That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

[Seal the Superior Court.]

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the Sheriffs of our Several Counties or their Deputies, Greeting:

(Seal.) We command you to attach the goods or estate of New York, New Haven & Hartford Railroad Company, a corporation duly organized and having an usual place of business in Boston, within our County of Suffolk, to the value of forty thousand dollars, and summon the said Defendant (if it may be found in your precinct) to appear before our Justices of our Superior Court to be holden at Boston, within and for our said County of Suffolk, on the first Monday of April next; then and there in our said Court to answer unto Mary E. Gillis of said Boston as she is the Administratrix of the estate of Alexander J. Gillis, late of said Boston, deceased, in an action of tort.

Declaration.

And the plaintiff says that she is the administratrix of the estate of Alexander J. Gillis, deceased; that on the third day of November, A. D. 1912, the defendant was a common carrier by railroad and engaged in interstate commerce; that on said day the said Alexander J. Gillis was employed by the defendant to engage in, and was on said day, in fact, engaged in interstate commerce; that while so em-

ployed and engaged at the railroad yard of the defendant located at Readville, in said County he received and suffered bodily injuries resulting in his death on the said third day of November, 1912, by reason of the negligence in whole or in part of one of the officers, agents or employes of the defendant.

And the plaintiff says that said Alexander J. Gillis left a widow and children surviving and that she brings this action pursuant to the provisions of 35 United States Statutes at Large 65 c. 149, and Acts in amendment thereof for the benefit of the surviving widow and children of the said Alexander J. Gillis.

By Her Attorney, JAMES J. MCCARTHY.

To the damage of the said Plaintiff (as she says) the sum of Forty Thousand Dollars which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, the tenth day of March, in the year of our Lord one thousand nine hundred and thirteen.

FRANCIS A. CAMPBELL, *Clerk.*

On which said writ return of service was made in the words and figures following, to wit:

"SUFFOLK, ss:

Boston, March 12th, 1913.

By virtue of this writ, I this day attached a chip as the property of the within named defendant corporation, New York, New Haven & Hartford Railroad Company, and afterwards on the same day summoned it to appear and answer at Court as within directed, by delivering to T. W. Hoogs, Esq., Secretary & T. E. Byrnes, Esq., its Vice President, and the officer in charge of its business, a summons together with an attested copy of this writ.

JEREMIAH G. FENNESSEY,
Deputy Sheriff."

Fees:

Service50
Copy	1.00
Travel08
	<hr/>
	\$1.58

On said first Monday of April, A. D. 1913, the Plaintiff appeared by James J. McCarthy, Esquire, her attorney, as aforesaid, entered the above entitled action and filed the following claim for a trial by jury, to wit:

4 SUFFOLK, ss:

Superior Court, — Sitting, 1913.

No. 72583.

GILLIS, Plff,

v.

N. Y., N. H. & H. R. R. —, Dft.

Jury Claim.

In the above action I claim a trial by jury.

JAMES J. MCCARTHY,
Attorney for Plff.

Thereafter on the sixteenth day of April, in said year, the following appearance in writing was entered, to wit:

SUFFOLK, ss:

Superior Court.

No. 72583.

MARY E. GILLIS, Adm'x,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

In the above action I appear for the defendant.

F. A. FARNHAM.
R.

Subsequently, on the sixth day of May, 1913, said Defendant filed its answer as follows, to wit:

SUFFOLK, ss:

Superior Court.

No. 72583.

MARY E. GILLIS, Adm'x,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

Defendant's Answer.

The defendant denies each and every allegation in plaintiff's writ and declaration set forth.

By Its Attorney, F. A. FARNHAM.
R.

5 Thence the case was continued unto the fifth day of September, 1913, when, on said day, the following appearance in writing was entered, to wit:

SUFFOLK, ss:

Superior Court, — Sitting, 191—.

No. 72583.

MARY E. GILLIS, Pl'ff,

v.

N. Y., N. H. & H. R. R. D'ft.

Appearance.

In the above action we appear for Def.

CHOATE, HALL & STEWART.

Thence the case was continued from time to time unto the thirtieth day of April, 1915, when, on said day, said Defendant filed its additional answer as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Superior C't.

MARY E. GILLIS, Adm'x,

v.

N. Y., N. H. & H. R. R. Co.

Additional Answer.

And further answering the defendant says that the intestate's injuries and death were due to and caused by negligence of the
6 intestate.

And further answering the defendant says the injuries and death were the result of acts, conditions and circumstances the happening of which was assumed by the plaintiff's intestate.

By Its Attorneys, CHOATE, HALL & STEWART.

And the following was endorsed on said additional answer, to wit:
"April 30, 1915. Filed by consent & leave of Court, in open Court. Att. Charles J. Hart, Ass't Clerk."

Afterward, to wit: on the third day of May, 1915, the cause, after a full hearing, was submitted to a jury sworn to try the same, who returned the following verdict, by direction of Court, to wit:

7 SUFFOLK, ss:

The Superior Court, April Sitting, A. D. 1915.

MARY E. GILLIS, Adm'x, Pl'f,

—

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Def't.

The Jury find for the Defendant.

JOHN J. COSGROVE,
Foreman of the Jury.

(Case to be reported to the Supreme Judicial Court.)

Thence the case was continued from time to time unto the twenty-third day of February, 1916, when, on said day, the case was reported to the Supreme Judicial Court for the Commonwealth by the presiding Justice, for the consideration by said Court of the law in the same, as follows, to wit:

8 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

MARY E. GILLIS, Adm'x,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Report.

This is an action of tort brought by the plaintiff as administratrix of the estate of Alexander J. Gillis, pursuant to the provisions of the Federal Employers' Liability Act to recover for the death of the said Alexander J. Gillis for the benefit of his surviving widow and children. The accident occurred on November 3, 1912.

The case was tried before White, J., and a jury. The pleadings may be referred to and the plan introduced in evidence may be used at the argument.

WALTER A. WHITE, called by the plaintiff, testified that he lived at Dedham for the last 35 years; that he was, and had been, yard-master of the defendant for 9 years at Readville, Mass.; that the Readville yard is a pretty big place; that there were six yards at Readville which he had charge of; that the place where the accident occurred was in the Readville transfer yard, so-called; he was yard-master there and had general charge of the yard and of the freight movements and the men who worked in it; general supervision of

the whole yard; his office was located about midway of the transfer yard, midway between the tower numbered 180 on the plan and the Readville station; it is marked on the plan "yardmaster's office" and is situated between tracks numbered 10 and 12; that the tower numbered 180 is at the southerly end of the Readville transfer yard; that the main line which connects with the Readville transfer yard is known as the Providence Division; that the Midland Division tracks cross the Providence Division tracks overhead as shown on the plan; that the accident occurred about 250 feet south from the northerly end of track 8, that is between the Midland Division tracks and the yardmaster's office; that the yardmaster's office measured about 20 feet by 12; that he was in supreme command of the transfer yard on the night of the accident; when he was on the job; that it was Sunday night; that there would be less men at work there on Sunday night. On the night of the accident he worked alone; no other men were then at work in the yard except one car inspector; that they didn't do much work there Sunday nights; that there was some work done there on that night before the accident; that there were no switching movements on that night; that the regular Sunday night road trains going west set off and picked up cars. When he said going west he meant going south that is coming from Boston going to Midway and Providence. They picked up their regular cars there; that is, whatever cars were to be picked up at the transfer yard and connected with trains going south towards Midway were taken from that yard every night as the trains went by from Boston going towards Midway; those cars were found on the group of tracks between track 16 and track 28; they were taken out by the engines on the freight trains coming in and picking them up; no switching was done by any switching engines. He could not remember the first thing he did when he came onto the job that night; that he always looked over the yard as soon as he could after he got to work; that he got to work at 7 o'clock in the evening and as soon as he conveniently could after that he looked the yard over to see what he had there; in looking the yard over he would usually get out and take the standing of the tracks; to "take the standing" meant, tracks he was going to do business on that night, take the number of cars on the tracks and see how much room he had; that is to say he examined the yard to see what was there and where it was; it might be 15 or 20 minutes, perhaps a half hour, might have been an hour after he went to work on the night of the accident that he looked over the yard; all depends on what happened that night. He looked two tracks over, or rather three tracks over after that; they were 6, 8 and 10; that was the second time he looked them over that night. He didn't think he made any other examination that night than the one which he spoke of as having been made shortly after he went to work and the time he looked over 6, 8 and 10, at a later time.

He further testified that there were changes made in the conditions at the transfer yard between the time when he came to work and the time when the accident happened; there were cars set off and picked up by the road trains; that "they might have a car to

leave." "For instance, they may have a car that belongs in Readville, or they might have a car with a hot box; something they wanted to set out, set that car off and pick up some more. That is what we call setting out and picking up." That there "most

10 probably was" some setting off and picking up that night between the time when he (witness) came on and the time when the accident happened; that he didn't have the records with him "but it is a pretty safe bet there was"; that he could almost safely say there was some setting off; that they kept records of every move that is made; every car that is set off; every car that is picked up, showing the car number and initial, where it is from; where it is going; and what it is loaded with; all entered upon a sheet; also the number of the train; the name of the conductor; the date; and the time.

He further testified that when a train came into the yard, he would know about its arrival; that the conductors report to the yardmaster's office when they arrive there, and get their instructions, "what to do." He meant "where to set their cars off, if they have any to set off; where to pick up, if they have any to pick up; also to get the bills that accompany the cars." That the conductors know themselves, how to get in and get out in an ordinary movement of that sort, that is to say a west-bound movement.

It was agreed between the counsel that wherever the railroad witnesses use the words "west" or "going west," they mean south or going south and wherever they use the words "east" or "going east" they mean north or going in a northerly direction.

He further testified that there was a difference in respect to trains coming into the yard to leave cars; that the regular route for a freight train coming from the west would be to approach the transfer yard on track 2, main line, Providence Division, until the train reached the tower shown on the plan and numbered 180; that the tower would switch train off right up over track 2, onto "freight main Number 2" as shown on the plan; that "freight main number 2" was simply a freight main in the Readville transfer yard; that if they wanted to come into the yard and come up on any other track besides one of these freight mains they would first ask permission from the yardmaster from somewhere either at tower 180 or down the line, to pull up on one of these tracks; that if a freight train coming from the west desired to leave cars at the Readville transfer yard, the conductor would, before he got there, or when he got there, communicate with the yardmaster if it was at night and ask permission to pull up on track 6. That would be the only track he could pull up on; generally speaking, that would be the only one he could go on, unless he went over one of these two which is the regular route.

He testified that any conductor, freight conductor, coming from the west with cars that he desired to leave, before leaving them at the Readville transfer yard would first get his permission to

11 do so.

Q. Now, he must do that before, or at the time he reaches tower No. 180?

A. No, sir. That if the conductor takes the regular route he goes away up over the hill to the other tower, which is almost a mile away; asks permission in that end of the yard which track he can set them off on; that a conductor may do one of two things. He may come into the yard and use freight main No. 2 and go clear up by the yardmaster's shanty and up onto or about the Midland Division and get into communication with the yardmaster over the 'phone, or if he had a long train his buggy would be down about opposite the yardmaster's office, he would jump off and go across, through the cars to the office; he would reach the yardmaster either by telephoning from the other tower which is near the Midland Division track, or by seeing him personally on the ground and getting such permission.

He further testified that there was another way of doing it; the conductor might communicate with him by telephone from tower 180; that they had telephone connections in all the towers; all the yards; engine houses, shops and every place of importance; that if a man wanted to communicate with the yardmaster's office when he came into tower 180 he would simply take down the receiver and ring one long ring and one short ring and the bell would be heard in the yardmaster's office; that the practical object in calling him up that way to obtain permission for setting off anywhere in the Readville transfer yard was that they might have trains all made up on certain tracks, going west or other cars which had been set out which they didn't want buried up, so no one was allowed to set cars off until they got instructions where to put them.

He further testified that the conditions in that transfer yard "are constantly changing all the time"; "that is, the tracks are filling up, and vacated"; "cars shifted, here, there and everywhere"; "that the conditions at one time may differ from conditions at another time." That he was the man who was particularly well acquainted with those various changes and conditions; that in the orderly administration of the work there, before changes are made, they were brought to his attention if everything went right; that if the work was properly done, he would be acquainted with such changes as might occur from time to time in the progress of the work, and that if the work is properly done he knew at all times the conditions in the yard; that was true of Sunday nights as well as week nights; any night, but on Sunday nights there were fewer changes than on week day nights, or were apt to be, and that was true of this Sunday night; that whatever he said with reference to changes occurring,

12 changes occurring in the orderly administration of that work, was true with reference to this particular Sunday night.

He further testified that after a man got his permission to pull in he would not always tell him where to go; that is he wouldn't specify any particular place where he should go. If he wanted him to come he would say, "yes, come ahead"; that the man wouldn't know where to go; that he would have things ready by the time he gets there; that he wouldn't tell him; that he never told him;

that he would prepare the place where he should go; that was because of his knowledge of the yard; that the yard is on a bad hill, and it is a bad place to take any chances. Before making any movements, outside of the regular movements, he wanted to be absolutely sure himself that the conditions were right, before he gave any such permission.

He further testified that on the evening of the accident Gillis pulled out at tower 180; that Gillis telephoned him; that he supposed Gillis was in the tower when he communicated with him; "he (witness) didn't know; tower 180 was half a mile away from him; that at the time he talked with Gillis he, the witness, was in his (yard-master's) office, the one that was pointed out on the plan; that Gillis said to him, 'I have a heavy train, 45 cars. I don't think my engine can haul them over the hill,' or 'haul them up track 2.' I don't know just which it was; means the same. He says, 'I have obtained permission from the Providence Division Dispatcher to drop my train on the main line if you will allow me to pull into the yard.' 'That's all he said to me.' That Gillis did tell him on the 'phone that "he had a very heavy train of 45 cars"; that Gillis's cars were eventually left on the main track, in the path of train 26, which was one of the fastest trains on the road; he testified at the inquest that "Gillis was right ahead of 26, which is one of the fastest trains on the road"; that he was not right ahead of it; he had half an hour on it; that "if a man has a half hour on it, we say he is right ahead of it"; "That is the way we term it in railroad circles"; that the rules are very rigid in regard to stopping one of those trains.

He further testified that train 26 was a New York to Boston train, one of the fast New York six hour trains; that Gillis called him up from the tower and said "I have 45 cars. I have a heavy train of 45 cars and I don't think the engine can handle them over the hill." "Or haul them over the hill. I don't remember just which it was." He says, 'I would like to pull up into the yard. I have obtained permission from the Providence Division dispatcher to leave my train on the main, if you will give me permission to pull into the yard.'

13 I think that is about what he said." That is all he said. I said 'All right Al, I will line up one of the clear tracks in front of the office to pull down and drop your 15 cars,' which I did."

He further testified that when Gillis called him up from the tower as he afterwards found out, track 6 proved to be clear; he meant by that, that at the time he was talking with Gillis he didn't know whether track 6 was clear or not.

Q. Track 6, you say, proved to be clear?

A. Yes, sir.

Q. Just what do you mean by that?

A. Why, at the time I was talking with Gillis, I didn't know whether track 6 was clear or not; that is, didn't absolutely know it was clear. It proved to be clear.

Q. Why?

A. Why, somebody might have made a bull or something. Some car might have run down off the hill, or 12 or 14, and sort of fouled

it, something like that. I wasn't absolutely sure that the track was clear until I went out and looked at the track. That, of course, was after.

That when he made the examination he went directly out of the office, right through, across track 10; took an observation of track 10, which he could do at night, without walking the whole distance of the track. He could tell whether that track is clear or not by taking an observation of the lights on each end, by getting down and squinting the rail. "That is the surest way to tell." He could also tell if he could see the switch light at the end and if he could do so the track must clear. He got 10 all right; then he climbed through the cars on 8 and did the same thing to 6; found 6, 8 and 10 were clear.

Mr. Hall: I understood him to say there were cars on 8.

He further testified that when he came out of his office after talking with Gillis he went directly west or approximately so, until he came to track 10, examined track 10 and saw that it was clear; that he climbed through the cars which he found on 8 and went to 6 and went through the same process there; 6 goes all the way to the tower. That there had been no movement of cars up to that time that night; that is, setting off or dropping cars on either one of those three tracks, 6, 8 or 10, but if his recollection served him right, an engine or two went down after water. That happens about every night; might have gone down over 6 or 10; he didn't recollect; that except for the fact that an engine or two went down after water there wasn't any movement of cars on 6, 8 or 10 that night between the time when he came on and the time when the accident happened.

He further testified that the place where the engines of two trains took water was pretty close to the place where the Midland tracks cross the Providence Division tracks as shown on the plan; it was probably an hour later that they took water; some time after 9 o'clock; 9:05; 10; might have been anywhere—"that would be an hour before Gillis got there." That there was absolutely no movement of any kind of engines or cars on tracks 6, 8 or 10 for at least an hour before Gillis came into the yard; that there was no movement of freight cars at all on either of those tracks between the time when he (yardmaster) came on and the time of the accident that night, except Gillis's cars.

He further testified that when he came on that night, or shortly after, he knew what was on tracks 6, 8, and 10 in front of the office.

Q. That is when you made your examination. What did you find when you made that examination was on track 8?

A. Found there were 18 cars on track 8, combination, mixed, box cars, coal cars and flat cars. Beginning at the Readville depot end of the transfer yard on track 8 there were flat cars on the head; he didn't remember whether they were coal cars, then box cars, or how they stood; there were 18 cars; there were flats ahead; 7 he believed; that in railroad parlance there would be seven flat cars at the easterly end of the cars on track 8; that behind them, going west, there were

coal cars and box cars and various other things, and more flat cars; that they were about 250 feet in from the east end of the track as near as he could remember. That was about where the accident took place, took place on the head car.

He further testified that beginning at a point on track 8 about 250 feet west of number 8 switch, that is 8 switch nearest the Midland Division the cars extended to a point beyond his office and just about filled the track up; that that part of the track would be filled or pretty near filled; that there was room enough left to give good clearance, what they call fouling.

Q. Now you say you went out to make an examination. The only purpose for making the examination at that time was to see that no cars had come down, through accident or otherwise, onto these tracks, 6, 8 and 10 in front of your office, from the hillside, or from some other part of the yard, as you say?

A. Or that some one hadn't made a bull. I made the examination to make absolutely sure that conditions were right for a move out of the ordinary.

Q. Well, who was there that night to make a bull except yourself?

A. Why, those trains that set off cars there the first part of the night, that I have mentioned.

Q. Did they set off cars there the first part of the night?

A. I said I did not recollect whether they did or not, but they might have; they might have set them off.

15 Q. Do you recollect any?

A. What's that?

Q. Do you recollect any?

A. I say I haven't my record with me; I couldn't tell you. Probably they did. That is the usual run.

Mr. McCarthy: Will you send for those records and bring them in Mr. Hall, please.

Mr. Hall: This is how long ago?

Mr. McCarthy: This is November 3, 1912.

Mr. Hall: The records are where, if he knows.

The Witness: We may possibly have those records at the transfer yard office, or the records may be stacked up in the attic at the freight office. I don't know exactly where they are myself.

Q. Now, when you went out and made your examination you found no evidence of a bull having been made, did you?

A. No, everything was all right.

Q. If any train had come in and left cars going west, or picked up cars going west, or trains going either way, either left or picked up cars, what time in the evening would they have been there; how long before the accident?

A. What time would they have been there, and how long?

Q. What time before the accident?

A. I said the last train in there was B. N. 1; got out of there an hour before Gillis was due; he at least an hour before the accident.

Q. Those trains that you say were there an hour before Gillis's

train was due were more or less engines, weren't they, going down to take water?

A. They were merely engines on tracks 6, 8 and 10, but they had other trains in the yard. They were doing work in the yard, and went down 6 or 10 for water. I don't say that they both went. I don't say that any went, but they usually do, and they probably did that night. I don't recollect whether they did or not.

Q. Well, there wasn't any bull to be apprehended, or danger to be apprehended from anything other than those engines which went down on those tracks, was there?

A. Oh, yes; there was. Those engines wouldn't have anything to do with it.

Q. What?

A. Those engines wouldn't have anything to do with it at all.

Q. How could any trains or cars be left in here on 6, 8 or 10 that evening without your knowledge?

A. Easiest thing in the world.

Q. How?

A. A man set a car off there, I wouldn't know anything about it. Right this side of my office, right on the west side of my office, there is another little shack, what they call the brakeman's shack. That is an out-house. We haven't any view out of the office; we
16 can't see those trains, where they might come in and slip a car on that end of 10 or that end of 6. We wouldn't know anything about it.

Q. If they did that, of course they would do it without your permission?

A. Certainly.

Q. They would do it, not in pursuance of their duty, but regardless of their duty?

A. Some one might have made a mistake; might have had a green man on; he might have made a mistake, or a car might have broken loose and run down the hill and fouled in there. We don't take any chances on it.

Q. You said there was some danger to be apprehended from some cars coming, as I understand it, down the hill. Do you mean from this point up here, toward the Midland Division, and following tracks 6, 8 and 10?

A. Yes.

Q. You said that, didn't you?

A. Here is the hill here—

Q. Let me get you right. You said that, didn't you?

A. I said there might be some cars run down the hill, yes, sir.

Q. How could any cars running down the hill foul track 10?

A. Car coming down off 12 would be just the car, or down off 14, would foul either one of those tracks; foul 6, 8 or 10; the whole three of them.

Q. You wouldn't have to squint along the rails to find that out, would you?

A. Not necessarily squint along the rail, but I would have to go out and find out.

Q. You could see it right from your office?

A. No; can't see a thing from my office.

Q. Can't you see a car across track 10 from your office?

A. No, sir, couldn't do it, you can't see a thing.

Q. Is that the bottom of the hill, the westerly end of track 10?

A. Yes, sir.

Q. All right. You made your observations in both directions in order to see whether there was any such possibility occurring?

A. I did.

Q. Now then, track 6 and 10 were clear?

A. Tracks 6 and 10 were clear.

Q. You knew that when you let Gillis come in?

A. Not when I told Gillis to come in.

Q. You knew it except for the possibility of some bull being made?

A. That is a big possibility, though. I didn't know it.

Q. Let me get it right. You knew it, except for the possibility of some bull being made that night?

A. Or some car breaking away; some such thing as that. I didn't know anything about.

Q. You have described all the movements of the trains that you know about in that yard that night before the accident happened?

A. I have described the way that they turned out to be, yes.

17 Q. And you don't recall anything except two engines which you say went down and took water?

Mr. Hall: He doesn't say that.

A. I don't recall that. I say they might have gone. It is a usual run; they do go down, and possibly they went down that night.

Q. And possibly not?

A. And possibly not.

Q. Aside from those two engines, there isn't anything you recall?

A. No, nothing that used either of those tracks, that I recall, that night.

Q. Or either of the other tracks, 12, 14, 16 or 20?

A. Oh, yes.

Q. What do you recall there?

A. Yes, we use those tracks. We used 16 and trains picked up on 16 that night.

Q. Picked up what?

A. Picked up freight cars.

Q. When?

A. Along about the neighborhood of 8 or 9 o'clock.

Q. Recall anything else?

A. That we did in that track.

Q. In that group of tracks; in that transfer yard?

A. I can't tell you what track they picked up on now, three or four years ago, but they picked up in that group of tracks from 16 over to 28, but I can't tell you now which tracks they picked up on. I haven't any record of them whatever, because we don't keep them.

Q. Do you recollect whether they picked them up? if they did any picking up before the accident or after?

A. Before the accident.

Q. And how long before?

A. Why, the last train that did any work there left there about one hour—about an hour before the accident. That is the only one.

Mr. Hall: What is what train?

The Witness: B. N. 1.

Q. What does that mean?

A. That is Boston & New Haven, No. 1.

Q. In the meantime—that is, in the hour immediately previous to the accident, where were you?

A. The hour previous to the accident, I was in the office, attending to my business.

Q. All the time?

A. Every minute of it, except while I was lining up the iron to let him in.

Q. You mean when you were lining up the iron for what?

A. You said where was I for an hour previous to the accident itself?

Q. That's what I want to get at.

A. I was in the office until I went out to inspect the tracks and line the iron up for Gillis to come in on 10.

Q. You lined up what track?

A. Track 10.

Q. Now, where was Gillis when the train pulled in by you?

A. Well, as it turned out to be since——

18 Q. No, no. I am asking now for what you knew then.

A. I didn't know it then.

Q. Didn't you?

A. Didn't know it then, no.

Q. Are you sure about that?

A. Positively sure I didn't know it then.

Q. Did you testify that you knew it then?

A. Did I testify that I knew it then.

Q. Yes; at the inquest.

A. Not that I know of. If I did, I was wrong, because I had no way of knowing it.

Q. Now, will you look at this on page 6 following that long question, which there was some discussion about—long answer, rather, which there was some discussion about, the last part of that answer. You say, "I set the iron for track 10, gave the engineer an all right signal, which he answered. That is the usual way. They hauled down by me, through 10." Is that correct.

A. That is all correct.

Q. Then follows the question, "where was Gillis." A. "Gillis was on the engine at the time." Did you say that?

A. I did because I answered——

Q. Wait, wait. Did you say it?

A. I said that, yes.

Q. Why did you say it in response to that question if it wasn't the fact?

A. Because it turned out to be true, that he was on the engine at the time. When I testified there, I didn't testify what I had actually seen, because I couldn't see the man, it was so dark.

Q. You couldn't see him?

A. It was so dark I couldn't see him. I knew there was a man there. I didn't know it was Gillis.

Q. You saw, then, some man on the engine?

A. I saw a man on the engine, as she went by me.

Q. How many men were on the engine?

A. Couldn't tell you that; that is, from a point of what I knew at that time, I couldn't tell you. I could tell you now, though, from what I have learned since.

Q. No, I don't care for that. How many, as you recollect it, did you observe at that time?

A. The only thing I noticed was a white light.

Q. What did that indicate to your mind?

A. That indicated that there was a man up on the engine.

Q. A man, aside from the engineer and fireman?

A. A man aside from the engineer.

Q. That would be one of the trainmen.

A. One of the trainmen.

Q. That is, seeing a man up there with a white light, you concluded one of the trainmen was riding on the engine?

A. Exactly.

Q. Do you know why he was riding there?

A. No, sir; I know what the duties of a brakeman riding there would be.

19 Q. Well, assuming he was there to perform his duty, what would his duty be, and why was he riding there?

A. That should have been—that white light should have been a brakeman.

Q. I didn't ask you that; I didn't ask you what should have been. Why do you suggest that?

A. You asked me what a man would be doing up there?

Q. Exactly.

A. Well, that man should have been a brakeman; that man should have been doing his work.

Q. All right; go ahead.

A. That is his place.

Q. What for?

A. To cut off the engine when they get to the place, set the brakes on the cars, turn switches and one thing another; let the engine back.

Q. The man who was there, you have related now, his duties; recounted his duties.

Mr. Hall: He has related the duties of a brakeman, Mr. McCarthy.

Mr. McCarthy: Do we differ on that at all.

Mr. Hall: I don't know; I hope not.

Mr. McCarthy: I didn't name the man.

Q. There should have been a man there whose duty it should be to ride that engine down to the point where the cars were stopped, cut off the engine, set the brakes on the cars that were left there and throw such switches as ought to be thrown. Is that correct?

A. That is correct.

He further testified that the engine was ahead of the 15 cars; that there were two tracks which the engine might have used in leaving the yard; the main line track and track 6; he knew that, when they pulled by him, and he was standing there near his yard office; after they pulled by him, as near as he remembered, he walked down to the rear end expecting to find Gillis.

That when he testified at the inquest that it was very important for Gillis to connect with those cars and move on as quickly as possible he was testifying to the truth and to the fact at that time; that he went to the tail end of Gillis's train of 15 cars to find Gillis expecting to find him there for the purpose of doing business with him; to get his bills and tell him what to do with his engine, what track to come back through with his engine; that he would have told him to come back through track 6 as that would be the track to use.

That it was absolutely necessary he should tell Gillis; that it was his business to tell him; that it was his business to see that there were no delays to Gillis while he was in the yard; that it was
20 not up to him to see that the engine and cars were moved in and out without damaging any of the other cars that were there.

That defendant's rules provide that yardmasters will have charge of the yard; the switching and making up of trains therein and the men employed therefor; that the rule refers to switching crews; yard switching crews; that he couldn't say he had full charge of Gillis's train, while he was in the yard. He was conductor of it; that he had no charge of Gillis's train whatever; that the rule providing that yardmasters "will be responsible for the proper distribution and placing of cars in the yard limit, and for the prompt movement of cars in and through the yard," meant placing cars on private sidings, or freight house platforms for rush transfer freight, or anything of that sort. That applies to switching crews placing cars; that although it didn't say anything about switching crews that is what it applied to; that the other part of the rule which reads "They will be responsible"—for the prompt movement of cars in and through the yard, "means they will be responsible for prompt movement of road trains"; that would mean we would keep the towers in touch all the time; that is the kind of train Gillis had; that the last rule applied to trains like Gillis's; that he did not have responsibility for the prompt movement of Gillis and his men and those cars that he had charge of into and out of the yard; that he had the responsibility of giving that train a good movement. That means he was to keep after the towers and see that they didn't plug them; didn't hold the signals against them; that there was a tower at each end of the yard which it was

necessary to have signals operated from. They were not hand type signals. There is a semaphore type signal at this end. There is a dwarf signal at this end. "My duty was to stay near that telephone and see that he wasn't plugged. Gillis's duty was to do the work." By not being plugged he meant not hold the signals against Gillis; that is, to stop, delay him; that it was his duty to see that Gillis was not held up unnecessarily.

Q. That is, Gillis should get in and out as quickly as possible?

A. Yes, Gillis knew how quickly he could go. He should get in and out within the time he had to do it in.

Q. Your duty was to see that nothing interfered with his getting in and out as quickly as possible?

A. As far as the tower men, etc., were concerned.

Q. Didn't it mean that it was your duty, in so far as you possibly could, to see that Gillis got in and out as quickly and safely as possible?

A. Not anything pertaining to that train; that is the trainmen's duty.

Q. Then it wasn't your duty, under the rules to see that
21 Gillis got in and out as quickly and safely as possible; do I understand you to say that?

A. No, I don't say that. I say it was my duty to a certain extent, as far as the towers were concerned.

Q. Then it was your duty to a certain extent to see that Gillis got in and out of the yard as quickly and safely as possible?

Mr. Hall: So far as the towers were concerned.

Q. That was to prevent the tower men from blocking his progress on the tracks.

A. Exactly.

Mr. McCarthy: You don't remember the page of that yardmaster's rule, do you?

Mr. Hall: Rule 823 was the rule.

Q. Now, you said it was your duty to see that Gillis got in and out as quickly as possible, in so far as to prevent the tower men from blocking his way? Is that correct.

A. That is correct.

Q. What tower men do you refer to?

A. Both of them; one at each end of the yard.

Q. 180 and what other?

A. 180 and 234.

That tower 234 was near the Midland R. R. bridge; it was so marked on the plan; that he would know whether they were blocking his way by observing the signals from his office; just outside of his office; that the man in tower 234 could block his way because he controlled the semaphore signal.

The location of switches 8, 10 and 6, the semaphore signal, the interlocking switch and the water plug were pointed out by the witness upon the plan and were duly marked as they now appear.

He further testified that the semaphore signal was a fixed signal

which gave notice of safety or danger; that he could see it from his yardmaster's office; that when it was set at danger it would show red; that when it showed red it would indicate that the engine couldn't get down and come up on track 6; that is to say, it couldn't get down from 10 and come back on 6.

Q. So that you were watching all the time to see that it came back on the right track, namely, the track you wanted it to come back on, and that was 6?

A. Oh, no; not watching all the time; I took an occasional glance at the signals to see that the towers wasn't plugging him, that was all.

Q. After you left the cars, the end of the cars where you say you went, expecting to meet Gillis, you went back to the office.
22 as you said, to see that he wasn't plugged up; I think those are the words you used.

A. It wasn't necessary to go back to the office; I could see in between the two tracks.

He further testified that he kept around the office to see that he wasn't plugged up; that if he found that one of the ways out was blocked so as to prevent him from going out on 6, he would have gone right to the telephone and 'phoned the men in the tower, 234. He supposed there were two men there at that time; he wasn't up there; there was supposed to be two men there; they operated that switch there; that and others; that he couldn't say what was going on the other side of that tower; that they might have been making movements of their own the other side of that tower, on the Midland Division; that he wouldn't have exact charge of that, because all that is main line.

He further testified that the movement which Gillis was engaged in making at the time of the accident was the only movement being made in the Readville yards.

Q. Now, you would have telephoned; then what would you have done, if you found the tracks blocked up?

A. I would have telephoned them in the tower and told them to give the signal to go down on 6.

Q. To give him the signal?

A. To give him the signal, so he could get down on 6.

Q. What sort of a signal would they have given him,—could they give?

A. Pulled down that semaphore to safety.

Q. If that semaphore, then, showed green, that would have indicated to Gillis that it was safe to proceed down back over 6, would it?

A. Yes, sir.

Q. Out over 6?

A. Yes, sir.

Q. And that you could have done by telephoning right from your yardmaster's office?

A. Yes, sir.

Q. Why didn't you?

A. What's that?

Q. Why didn't you?

A. I didn't say it was at danger; I haven't said it was at danger.

Q. Why didn't you telephone from your office to the men in the tower to set the signals for track 6, which would then indicate when it was set, to Gillis, that he could have proceeded out over 6, which was the safe track?

A. The signal was set all the time.

Q. For 6?

A. The semaphore signal was set at safety during all the movements.

Q. Was it set for 6?

A. Set for 6?

Q. Yes.

A. Couldn't be set for 6.

23 Q. I understood you to say that when the semaphore signal was set at safety, it showed a green light?

A. Yes, sir.

Q. That it would indicate to Gillis, if he looked at it, that it was safe for him to proceed out over 6?

A. No, sir.

Q. Did I get you right?

A. No, sir.

Q. You didn't testify to that?

A. Didn't say that.

Q. Then if the tracks were blocked there, the signal would show red, wouldn't it?

A. Not necessarily, no.

Q. I understood you to say, Mr. White, that you kept near the office so that you could prevent Gillis's way being blocked out of the yard by the men in the tower, did I get you right?

A. Right.

Q. Now if his way out had been blocked by the men in tower 234, how could you have removed the block, that's what I want to get at?

A. You mean if there were cars down here, from, we will say, from this semaphore signal in between here?

Q. In whatever way it could have been blocked?

A. It wouldn't have any effect on that signal whatever.

Q. I am not a railroad man and I don't know?

A. It wouldn't have any effect on that signal whatever.

Q. Now, listen again, if you please. You kept near the office so as to communicate with the men in the tower, and in that way prevent Gillis's way out being blocked? You said that now, didn't you?

A. Well, I meant that—that is, it means that, but this is what I said.

Q. All right, go ahead.

A. I said to keep the towers from blocking him unnecessarily.

— And by blocking him, you mean?

A. Holding the signal against him.

Q. Holding the signal against him, well, they wouldn't hold the signal against him, unless the tracks were blocked would they?

A. Oh, yes, indeed; the track wouldn't have to be blocked.

Q. Wouldn't?

A. No.

Q. Will you be good enough to explain that?

A. All signals, when not in use, are supposed to be normal; what they call in normal position; when not in use they are supposed to be in the normal position, which is danger. When we are using that track, about to use it, and the conditions are all right, they pull that signal up to safety position, which at night would show a green light, and the normal position at night would show a red light.

Q. Do you recall whether the signal was in use or not?

A. I had no occasion to call up the tower. It was all right.

Q. The signals were all right?

A. Yes, sir. I had no occasion to call up the tower.

24 Q. Then they showed green did they?

A. They showed green.

Q. Suppose the tracks had been blocked down in here between his way out;—between the interlocking switch and switch 10, had been blocked, what would you have done?

A. Blocked in between here?

Q. Yes, between those two points.

A. I never would let the train down there if it was.

Q. I say what could you have done if you found it was?

A. I couldn't do anything if I found it was blocked then.

Q. Why couldn't you?

A. I made sure it wasn't blocked before I let him down there.

Q. I mean if it had been blocked, couldn't you have communicated with the tower?

A. I don't understand it because I wouldn't let him down there if it was blocked. I would have known that before he went there. After the train pulled down there, I would have no way of seeing those cars then, very handily, without walking down there. The train was blocking that track then.

Mr. Hall: By "that track" you mean 10, I assume, 10 track; he was blocking that track.

The Witness: As I understand it, he says, if cars were between 6 switch and 10 switch.

Q. 10 switch.

A. Between 10 switch and 6 switch.

Q. No, not 6 switch. I have said between the interlocking switch—

A. Well, between the interlocking switch and 10 switch.

Q. If he was blocked up there?

A. If they were on the interlocking the tower man could tell me that track was blocked.

Q. Now, was there any way of communicating with the men down here from the tower?

A. No, sir.

Q. Didn't they have any lanterns in the tower?

A. Yes, sir.

Q. Didn't they have any megaphones in the tower?

A. Yes, sir.

Q. What did they use a megaphone for?

A. Why, they some times use the megaphone—well, for various reasons, for anything, in fact; if you want to holler to a man that is across the track, use it for that.

Q. Did you ever use the tower for that purpose and reach a man in that way?

A. We don't do it very often; only in case of extreme emergency.

Q. My question was whether you ever did?

A. Oh, I have done it, yes.

Q. So that you could have communicated with the men down on this end of the train, near track 6 switch, by communicating with the tower, by telephoning and they in turn by the use of the megaphone.

A. It is not a safe way to do business.

25 Q. My question was whether it could be done?

A. It could be done. He could holler without a megaphone, with his mouth, but it isn't a safe way of doing business.

Q. He could holler more effectively with a megaphone?

A. Yes, sir.

Q. You could if Gillis was down on the head end of the train when they pulled in there, have telephoned the tower men to tell Gillis to go out on 6, couldn't you?

A. I could have done so, if I——

Q. That answers my question. Now when you went to the end of the train of the 15 cars that he left on the track, you found that Gillis wasn't there?

A. Gillis wasn't there.

Q. You learned where he was; you had learned that he had gone down on the head end by that time, hadn't you?

A. No, I hadn't; not positively.

Q. What?

A. No, sir, not positively. I didn't know that Gillis was on the head end; I knew that somebody was there.

Q. You knew there were three men on Gillis's train?

A. Yes, sir. I assumed there was.

That there ought to have been 3 men there, consisting of a flag man who was way out on track 2 beyond the tower, the head end brakeman who should have been at the head end and Gillis; that it was always customary to ride in on the cut that would be near the rear end of his 15 cars. That he didn't recollect ever saying that he found a brakeman there at the end of the 15 cars where he expected to find Gillis; that he never said so to his knowledge.

He further testified that after Gillis hauled up the 15 cars onto track 10, he went back to the rear end of the cars expecting to find the conductor there, which is his place, receive the bills which he had for the cars; give him his instructions which track was clear to bring his engine back through again; that when he got back there he found that Gillis had gone down to the head end, and a brakeman was on the rear end where Gillis ought to have been.

He further testified that at the time when he found a brakeman at

the rear end of the 15 cars he had no idea where Gillis was; that Gillis might have been half way back from the engine at that time; that when he testified that he found Gillis had gone down to the head end, he meant, that he had gone down to the head end of the 15 cars; either on the engine,—probably on the engine.

That after learning Gillis wasn't there at the end of the 15 cars he went back toward the office, stayed around the office, a few feet away from it; that he was waiting there, "watching the signals";
26 listening for telephones and one thing and another; doing his duty where he was supposed to be, right there. That he was waiting for nothing in particular; doing his business; waiting for Gillis to come along, and he could do business with him; that after finding Gillis had gone to the head end, he waited for Gillis to come back to him, to do business with him.

Q. What business?

A. To give him the bills; ask me what track to bring the engine back through, etc. That is my duty.

That it was his duty to get Gillis out of there and get him out safely as far as the tower is concerned; not as far as trains were concerned; that the towers might have plugged Gillis; that he didn't know when at the yardmaster's office, whether Gillis was down with the engine or not. "I knew he had gone down"; that he might have dropped off when half way down the track, "commence setting up brakes in the middle, started back to see me; something of that sort. "I can't say he was down there then"; that if Gillis had dropped off he wouldn't have seen him necessarily.

Q. You would have seen the man who had the light on the engine when he dropped off the train immediately he struck the ground, wouldn't you?

A. No, sir, I would not.

Q. You would have seen the light, wouldn't you?

A. No, sir.

Q. Why not?

A. I might have seen him if I had made it my business to look for him.

Q. You didn't have anything else to do, did you?

A. I can't recollect now but I did. I say a man could have dropped off and I wouldn't have seen him.

Q. If you were looking in that direction, in the direction of the head end of those 15 cars, you would have seen him if he dropped off?

A. If he dropped off I would have seen him. If he went back of the cars, I wouldn't have seen him.

He further testified that when the train of 15 cars was pulling down he was standing; that when that train stopped he was within a few feet of the yardmaster's office; that he couldn't say how long he waited at the office, "a very few minutes"; that he didn't think it was over 3 or 4 minutes perhaps; something like that. He then heard a crash which proved to be on track 8; that it sounded in an easterly direction; that when he heard the crash he went down to investigate; that he couldn't tell how long it took him to get down there.

Q. A few minutes?

A. A few minutes; I don't know how many minutes.

27 That he found there was a collision on track 8, about 250 feet in from switch 8 and 10; that the collision was between Gillis's engine and some flat cars that were on track 8; that the flat cars set low; that they were "very hard to be seen"; that it was very hard to see a flat car; that the head flat car which was a small wooden under-frame flat car was broken up on one end pretty badly; that those flat cars were a very flimsy car compared with the rest of the cars on that track; that with any kind of a jolt at all they would expect one of those flat-cars to go to pieces, with a big car running into them; that there were 18 cars on track 8 at the time of the collision; 6 or 7 of them were flat cars.

Q. Now you say you expected Gillis was going to come back to you at your office; he was way down here at the switch 6 and 8.

Mr. Hall: He hasn't said that.

A. I don't know whether he was or not.

Q. Then you knew Gillis had gone up to the head end?

A. Not to the head end. I knew that he had gone up toward the head end?

Q. You testified before the Judge at the inquest that when you got back there you found that Gillis had gone down to the head end, didn't you? Your words being "when I got back, I found that Gillis had gone down to the head end."

A. That's all right; I didn't see him when he went to the head end, though.

Q. You expected if he was at the head end that he would come clear down to your office and find out from you what track he would go out on before he had made any movement of his train out of the yard, or his engine?

A. It is his duty to come to me.

That Gillis after coming to him would not necessarily have to go back to the engine to throw 6 switch which would let him out of the yard because his head brakeman might be half way down there by that time; that Gillis's head brakeman was setting brakes at the tail end; that he might have been working down towards the head end; that it was his duty to do that work. That Gillis wouldn't have to go down to 6 switch; he would send his man.

Q. When you last saw that man, the only other man, he was right there on the rear end of those cars?

A. Yes, sir.

Q. You knew that, so you knew at that time that man was not down operating for Gillis?

A. Correct.

That the brakeman probably would be working down toward the middle of his train by that time setting brakes; that when Gillis got his instructions from him, he would simply holler down to that man to go down and let him through 6; that if Gillis came to him it would not necessarily involve his traveling the

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distance between the head end and rear end of the train and back again to the head end, that when Gillis was going down, he might have started climbing over those cars on the way down; that he might have been half way down when the witness was at the rear of the train.

Q. No, I am asking you to assume he was at the end of the train?

A. It wouldn't be fair to assume he was at the head end.

Q. He was at the head end and you know it, don't you?

A. I don't know it, no; he might have been at the head end; he might have been back here.

Q. I asked you to assume he was at the head end and you don't need to concede it at all.

A. All right.

Q. Assume Gillis was at the head end he would have to travel *at* long distance to your office in order to communicate with you?

A. Yes, sir, it would be quite a distance.

Q. And you could have communicated with him if he was down in the vicinity of the water plug by means of the men in the tower 234?

A. We don't do business with the tower men.

Q. I am asking you whether you could have, sir; never mind the excuses.

A. I could have

Q. There was another way you could have let Gillis out; that was the main track which was absolutely clear?

A. Never use main tracks when the yard tracks are clear; it would not be necessary.

Q. I am asking you whether you could have or not.

A. I could, but it would take longer to do it.

Q. You could have let him out on the main track by telephoning from your yardmaster's office directly to the tower to have Gillis go out on the main track, and all the tower man would have had to do would be to throw the interlocking switch and let him out—his train, on the main track?

A. That would be mighty poor railroading.

Q. Isn't it so?

A. It could have been done, yes.

Q. It could have been done quicker and safer than the movement that was actually made; isn't that true?

A. No, sir; it couldn't.

Q. It would have been safer, wouldn't it?

A. It wouldn't have been quicker.

Q. It would have been safer?

Mr. Hall: Safer than what.

Q. Safer than the movement that was actually made?

A. No, sir, it would not.

29 Q. There wasn't anything on the main track between the cars which he had left west of the tower and the interlocking switch, was there?

A. That is running against the current of traffic.

He further testified that there were no cars on the main line between the cars which Gillis had left west of tower 180 and the interlocking switch, and that there was no current of traffic between those towers at that time of night on track 4.

The plaintiff introduced in evidence rule 821 of the defendant which under the duties of yardmaster reads: "They must see that cars to be transferred are properly placed, and avoid all unnecessary delay to such freight."

He further testified that the night of the accident it was dark; that there was no moon; that the accident happened on November 3, 1912 at about 10-20 P. M.; that Gillis was either 28 or 29 minutes ahead of the fast train which followed him; that if Gillis had arrived at the yard at 10-15, he would have until 10-44; when the fast passenger train was due at that point; that Gillis was bound for Boston after setting off the Readville cars; that after leaving the cars he would go back and get the remainder of his train and go over the regular route "Freight main #2," swing on the Midland and go to Boston; that if Gillis had completed his movement and got out in safety he would have had to go back and pick up his cars on the main line, hook his engine onto the cars there; that he would come right back on track 6, which extends all the way down to tower 180, back up on 4.

He further testified there were 30 cars left by Gillis on "Main line, Track 2" west of tower 180; that there was a flag man guarding the rear end of those 30 cars and that he was supposed to be, ought to be, 30 telegraph poles away; that 30 telegraph poles would be $\frac{3}{4}$ of a mile; it was a very dark night and he might go a little further; that he would go $\frac{3}{4}$ of a mile to a mile away from the rear end; $\frac{3}{4}$ of a mile away any way, perhaps a mile; might be a little less; might use fuses and only go a short distance; that at any rate he was supposed to be $\frac{3}{4}$ of a mile to a mile back of the 30 cars; that when the engine came in and hooked onto the 30 cars, they would have to whistle for the man to come in; they would whistle on the way down before they got there and give him a chance to start walking back.

The plaintiff introduced in evidence rules affecting yardmasters numbered 822, 823 and 824.

Rule 822: "They will have charge of the yard, the switching and making up of trains therein and the men employed therefor. They will see that cars are carefully handled and that no unnecessary noise is made by engines and employees, giving particular attention to the work in connection with or near sleeping cars in service, and see that the occupants are not unnecessarily disturbed."

Rule 823: "They will be responsible for the proper distribution and placing of cars in the yard limit and for the prompt movement of the cars in and through the yard."

Rule 824: "They must be familiar with the rules for movement of trains and for the government of employees in train and yard

service, and must require the prompt and efficient discharge of duty by all employes subject to their direction."

On cross examination the witness testified: I am 35 years of age, and have been a railroad man for 17 years. I began as assistant station agent at Boylston and did yardmaster's work for 5 years before my appointment as yardmaster of the Readville yard. There are six branches of the Readville yard; my office is the main headquarters of the yardmasters; there I can communicate with every place except the locomotive yard at night; I have general supervision of all yard work; keep an eye over the passenger station and over the towers; by "general supervision" I mean that I see that cars are set off on the proper tracks, see that the proper cars go on the proper trains, see that the perishable freight is removed, see that there are no delays, unnecessary delays occur to road trains and see that the towers are giving all proper movements. My clerk starts in as soon as the cars arrive and takes a check on week-day nights. On Sundays I am there alone. The billing of cars is done in the yard, each car traveling on a card manifest. This shows the number and initial of the car, where it is from, its destination, its load, tonnage, and the amount of freight charges. Our yard is a transfer point. Car bills are put up in a rack and are all surrendered to me. I keep them until the cars move; when the cars move they are turned over to the conductor; when the conductor comes in to take out cars, he comes into my office; we figure up the tonnage of his train, which varies according to the grades. When he arrives, I take down whatever bills it is necessary to fill out, figure up the cars, figure the tonnage; that is all done in the office before the conductor goes out to make a move; then I tell him which track cars are on and he gets them. If he has cars to set off, I tell him upon which track to put them. There are two main lines from Providence to Boston; these branch into four, and there are two known as track 1 and 2. The conductor cuts off this side of tower 180; that is a little over half a mile to my office and 8 1/10 of a mile to the station. When the conductor cuts off, he comes up on six. The distance of 10 switch from my office is in the neighborhood of 900 feet. When Gillis telephoned to me
31 from the tower he told me he wanted to leave 15 cars and that he had received permission from the Providence dispatcher in Providence.

The Providence Division dispatcher controls that iron outside of my jurisdiction. We control as far as here (indicating) on track 2. On track 6 we control a little further. That is a yard track. I told Gillis that we would line up one of the tracks, and by "line up" I meant set the route, set the switch for him, see that all the other switches were lined in accord with it right down on to 10, so that everything would be all straight for the lead—whatever track I was going to line, either 10 or 6, whichever it happened to be. I didn't tell him any number; I didn't say anything about any number whatever.

After I had told him that I would line a track for him so that he could come into the yard, I immediately went out and took a

look at track 10, climbed through the cars on 8 and took a look at 6 to make absolutely sure that these tracks were right and also that the conditions were right for that kind of a move. This is out of the ordinary in this way:—The regular route for freight trains would be up over track 2, which is a heavy grade, big hill. It would be over this track 2—freight main track. These are entirely different tracks from what they call track 2—passenger main. That is the regular route for all freight trains. If the conductor feels that he ought to make a different route—that is, if he thought the train could not be hauled up over the hill or something of that sort or he ought to make a yard movement, he asks permission of the yardmaster. That is a move which is out of the ordinary, and we have got to be very careful that conditions are right, because it is a very, very dangerous yard. As I say, it is a heavy grade. These cars are up on these yard tracks and they are just as liable to get away and we not know it and go down that way, and therefore we can't let anything up in there until we are sure conditions are right for that kind of a move. A conductor would go into the yard with a freight train because that is on the level. He could cut his 15 cars off, which would reduce that train of his by 15 cars. He would haul them through the level and head-pin them there. I mean, cut off the engine down here (indicating) and come back through track 6. He could then connect with his train because track 6 leads all the way down and goes a way down hill still further. It is a yard track.

Gillis left his train on the main line track 2 (indicating on plan). That is the regular freight train route; the "main line" and the freight main line are distinguished. The passenger express would have passed tower 180 and gone on track 2 to Boston. They branch off here (indicating) beginning at the interlocking.

Gillis told me that he had permission to leave his train back 32 here and drop 15 cars in my transfer yard, or words to that effect. On account of his load, he didn't want to go over this hill on his way to Boston.

I found out that track 10 was clear. There were no cars upon it, and track 6 was clear—no cars upon that. There were cars on track 8. Between the time that I went out and assured myself that tracks 10 and 6 were clear and the time I saw the engine with the cars go by, I had time to walk down to number 10 switch (indicating). I had time to walk down there (about 320 feet) to that switch and wait there some few minutes; I can't just say how long. He wasn't right on me when I had the switch thrown—I waited some minute or two probably. That switch was known as 10 switch and that let him (Gillis) in on track 10. That is, other switches to the west would all have to be lined in conjunction with this switch. I could see by the lights that they were lined. At that time, for the diverging track they showed a red light and a green light if they were set for the lead all the way down. Therefore, if this track 10 was set for the diverging track, that would show a red light. Switch 14 would also show a red light, because that comes off of this. All these here

(indicating) would be green all the way down. I could see whether they were all right or not. I threw that switch myself.

"Q. That would tell the conductor who was approaching that everything was clear, would it not?"

"A. The conductor could tell by looking at the switches, but as I told him—I don't know as I told him, but I made a hand signal,—the engineer knew everything was all right." I gave him the hand signal from some point right around 10 switch. That is known as the "high ball," where the hand is raised over the front. It is a "come on" signal.

If a conductor made a request to come in to the yard, saying that he wanted to leave cars, I might put him on any of these tracks—any of them at all—cut his engine off here, come back through in here (indicating). I might say, "cut your engine off, go down one of these freight mains, get your train." If those tracks happened to be clear, I might be able to make some such move as that. As it happened that night those tracks were probably blocked and I made this move down in here. After the train, engine and cars had gone by me, I walked down toward the rear end of the 15 cars to find the conductor, get his bills and do the business with him—give him his instructions. I mean the bills of the 15 cars which he was going to leave with me. These cars were to be distributed by me at Readville to these various points within that zone. It is a conductor's duty to report to the yardmaster as soon as they can after running in the yard, give him the bills and receive any instructions the yardmaster may have for him. When I went toward the rear of that

33 train and found that the conductor was not there, I went

back so as to be handy around the yard office, I didn't go to it, I went near it, so I could answer any telephone or so I could get in touch with the tower in case there was a block. It might have been necessary for me to be in communication with the other yard that night; they might call me up from some other yard; something might happen in another yard; they might call me up at any minute. My duty was to hang pretty close to the yard office, because I had no clerk—I was working alone at that time.

Under the circumstances of this sort of a movement, it was the practice of the conductors that came into the yard in ascertaining what tracks they were to go back on after they had left their cars on a track such as track 10, to ride down on the cut. That would be 15 cars back of the engine in this case. He would ride down on that and hop off as soon as he saw me. If he didn't see me before he got to the office, he would hop off when he got to the office, present his bills and take his instructions. He would there learn from me what track was clear for him to go back on and rejoin his train on the main line. It was the practice of the conductors to learn from me just what track was clear for them to come back and rejoin their train on the main line. I give those instructions to the conductor. The conductors alone get those instructions from me. It was their practice to come to me, or to come to my office, to ascertain those instructions. As I understand it, Mr. Gillis came back on track 8,

upon which there were cars. I had given no instructions whatever to come back on track 8. I know of no one that had given him any such instructions. There was an open track—namely, track 6, by which he could have come back perfectly safely, and in that way rejoined his train clear down here (indicating) on the main line. That was all set or lined up for him. I had inspected track 6 before lining the iron up for 10. I inspected 10 and 6 both and knew absolutely that track 6 was clear. I knew that. I threw no switch in connection with 6. All he would have to have done was to have thrown this 6 switch instead of 8. Of course, 10 had his 15 cars and he couldn't go back that way. 8 had cars about 250 feet in. It was all full except 250 feet on this end (pointing to a place opposite 12 on plan of track 8). In order to get on 8 he had to throw that switch (indicating). Of course, he had to throw 6, or some one had to throw 6 switch, in order to get in on track 6. The movements of the engine under those circumstances are under the control of the conductor. A road conductor has full charge of his train and is responsible for all movements of that train until he gets back onto the main line; also responsible then until he gets the train to Boston, but he is responsible at all times for the safety of that train.

34 Gillis was about 35 years old. He had been a conductor since 1902. He came to the New Haven about 1897. I had observed him in his work as conductor; he seemed very familiar with his work—a very good man. He was apparently familiar with the rules and thoroughly experienced. He had never worked on any division other than this Providence Division, and his service was entirely in the freight department. I had known of his coming to the Readville yard numerous times.

Q. Mr. McCarthy suggested that you might have set up or let him out on the main line and you said that would be "poor railroading"—I wish you would explain that.

A. Why, what I meant by "poor railroading" was this, to run west on track 4; trains are run with the current of traffic on a railroad; the westbound trains on the New Haven road are operated on tracks 1 and 3; the eastbound trains are operated on tracks 2 and 4; therefore, to put him back from tower 234 down in here to tower 180 on track 4 would be running against the current of traffic, which I have no right whatever to do unless we make it under a train order or under flag protection. If that move was to be made under a flag protection, it would mean Gillis's head end man or Gillis himself would have to walk all the way from down around my yard shanty here or wherever they happened to be at that time; they would have to go down ahead to that other tower to protect that engine while it was coming back, against the current of traffic. The train is down on track 2; the engine would be going back on track 4 until they came to the interlocking down there to connect on track 2; that would be directly against the rule, against the current of traffic, and it could not be made under any consideration without train orders, which would take a long time to get because they come over the wire, from the train dispatcher at Boston in this case, because we would be under the Boston division; or you could make the

movement under flag protection, which would have been a long distance to walk because it is some distance to that tower; it would have been a very long way indeed.

Q. Was there any other way, any other way physically, without having the cars on 8 or pushing back the cars on track 10, by which Gillis could have gone and got his engine back to his train?

A. No way; the only way is to have gone through track 6.

Q. Now something has been said about a megaphone,—I want to be sure that is cleared up, about telephoning that tower and then having them megaphone to Gillis,—would that be good railroading?

A. We don't consider that safe; that information is handed out in a second hand way; we would have to depend on that tower man quoting us properly. Where there are cars in a case like this on track 8,

that tower man might say, "Come through 8, the yard master
35 says come through 8." I would be held responsible for it.

Q. It is not the practice?

A. We don't do business that way with them. We do it personally between the conductors and ourselves, unless in a case of extreme emergency, where we have to depend on it; it is not the general practice.

Q. What does the semaphore control?

A. The semaphore is a signal that controls the yard, that is, it controls the use of these tracks, trains coming out of the yard on to the interlocking of the Providence division. Now, for instance, making a move up track 4, we would have to have that signal just the same to get out on the interlocking and go through 4; we would have to have it for 6 because there isn't room in there for the engine to go down and clear 6 switch without having that semaphore, and engines would have to have that semaphore to make a move on 8, so that semaphore really controls the whole of this end of the yard.

Q. In addition to the semaphore signals, there are these hand signals that control these other switches?

A. Yes, each switch has an indicating light.

Q. So that switch 8 and 10 switch—there were two switches there, were there not?

A. One switch for tracks 8 and 10.

Q. When an engine moved over the switch at 10 and went by it, that was closed against track 8, was it not?

A. Yes, sir.

Q. You would have to turn the switch again in order to get it on to track 8?

A. Yes, sir.

Q. The fact that the semaphore is here has nothing to do with the throwing of these switches for tracks 8, 6 and 10?

A. No, sir, the switches on these tracks can be thrown independent of the safety of the semaphore; they are operated independent of the interlocking; the semaphore signal is worked in connection with the interlocking iron.

That the practice in the yard on the part of conductors of assuring themselves that a track was clear before they moved upon it was to get instructions. If they felt that they could feel their way up

through without coming back for instructions and feel they wanted to take the responsibility of bringing their engine back, taking the chance that their track was clear, they would get on the back end of the engine in plain sight of the engineer and motion him back carefully until they were sure the track was clear. That would be on a dark night—that is when they take the responsibility on themselves. The rules were that they should learn from me whether or not the track was clear.

He further testified, I went up to the cut of 15 cars and found that Gillis was not there. I didn't know whether he was at that
36 time. I thought he might be at the head end. I turned and went back toward the office and stayed around. It didn't seem to me more than 3 or 4 minutes before I heard the crash and then I went up and found that Gillis was in the accident. The tender was in collision with a flat car; the engine was on track 8. He had come through without any instruction from me to go through on that track. The semaphore simply gave him a right to go out to that interlocking. It protects the interlocking only. You can't get out on the main line unless you have the semaphore at safety. It has no reference other than that you can't get up on track 6; you can't back through track 6, because you can't get far enough unless you have this semaphore at safety. That is to say, a man coming up here on track 10 goes in that direction and finds he can go to the interlocking or the region that is described as the interlocking, and go on the interlocking and go on one of these tracks provided it is clear for him to go there by the hand switch. The interlocking only provides for this part here, that is, near the bridge. Gillis could have run up the hill to the tower if he happened to be at the head end, gone to the tower and called me up. I was handy enough to the office to have heard the bell—that tower would be number 234. The crews on the switches, and all of the clerks, in fact, the conductors of all trains, when they do work in the yard do it under my direction.

(By Mr. Hall:)

Q. Mr. White, I meant to have called your attention to something that was read to you in the stenographer's minutes. It appears that you said—you testified on direct examination that after you had told Mr. Gillis that you would line up the tracks, you said you went out and looked on 10; then crawled over, or went through the cars on 8; then looked on 6, and I think you said that 6, 8 and 10 were clear. Did you mean to say that?

A. I made a mistake. I crawled through the cars on 8.

Q. That must have been a mistake?

A. That was a mistake.

Q. What you meant was that 6 and 10 were clear?

A. I meant to say that 6 and 10 were clear.

That Gillis had been in the habit of coming into the yard for a number of years leaving his cars in that part of the yard, pulling back and joining his train on the main line. Before that he had

always come to me for instructions as to what track he would pull back upon.

Upon re-direct examination, the witness testified:—Gillis was a very good railroad man and knew what was required in the performance of his work; I never heard anything against him.

Q. Now, you say, as I understand it, that he was making an unusual movement at this time?

A. Not an unusual movement, no, sir.

37 Q. Well, what did you say in that regard?

A. It is a movement out of the ordinary, from the regular route, that is all.

The cars that were left off at Readville were Readville cars.

Q. Now, will you show me the rule in that book which would forbid the use of track 4 by Gillis in leaving the yard?

A. No, I can't show you the rule that will forbid the use of track 4, specifying track 4; can't show you that, but I can show you about train orders here, current of traffic, and all that sort of thing.

Q. It is the last paragraph in rule 78 on pages 28 and 29. Is that all you find that you say applies to that situation, which would forbid the use of track 4 under the circumstances which obtained on that occasion?

A. Why, there is more there about train orders, but that covers it. We are forbidden to use these tracks.

Q. Show what else you find.

A. That rule, and these rules for train orders covers the whole thing; that is all in a general way; there is no track 4 there.

Q. I want you to pick out and point out to me the part of the rules which you say apply to that condition there, which forbade their using track 4.

A. I have pointed out a rule where it forbids us using the track against the current of traffic.

Q. You pointed out rule 78?

A. Yes, sir. That shows us how to use them against the current of traffic.

Q. What are you showing me, in addition to that?

A. Train orders.

Q. What rules?

A. All these rules; this is by train orders.

Q. "Rules for movement by train orders?"

A. Exactly.

Q. That does not apply to this case, does it?

A. Yes, sir; applies to track 4.

Q. He was not moving by train order, was he?

A. He would if he went up that track.

Q. He would?

A. This is moving trains against the current of traffic and that was against the current of traffic. That is what these rules are for.

Q. Now, let us stick to the question. Have you got the rules?

A. I have.

Q. Which you say would be violated if they used track 4 that night in coming out of the yard?

A. Yes, sir.

Mr. Hall: I submit to the court——

Q. Read it.

Mr. Hall: Does your Honor think that is the fair way to get the true condition of things that existed there?

38 The Court: He has said that it was against the rule to use track 4 against the current of traffic. Now he is asked to read the rule, and he may.

Q. All right, sir, go ahead.

A. Read this rule?

Q. Now, my question was specific. Read the rules; rule or rules which forbid the use of track 4 under those circumstances.

A. "On four track sections south or west bound trains will use tracks number 1 and number 3; north or east bound trains will use tracks 2 and 4." That is rule 78 under heading "Designation of Tracks."

Q. Now is there any other rule that applies?

A. That is the only rule that I know of that applies to using that, except how to use them.

Q. How to use them against the current of traffic?

A. Train orders.

Q. All right.

A. Or flag protection.

Q. Now you have turned to another chapter which is entitled "Rules for movement by train order"?

A. Yes, sir.

Q. And under that heading you find directions whereby trains can move against the current of traffic, do you?

A. Yes, sir.

The definition of a train is an engine with or without cars displaying markers. If an engine were backed up on track 4 to get out on the road, that would be a train as defined by the rules. In order to enter track 4, one would have to approach from this end, on 2, following the current of traffic. In order to use number 4, a man would have to walk clear from that end, where the Midland bridge goes across down to this end, to protect the engine against the current of traffic which might be running on track 4. The current of traffic on track 4 would be from west to east. The only approach to track 4 was over track 2. The current of traffic would have to start on track 2, down through 4; the traffic on track 2 at that time from a point near the tower was absolutely blocked.

Q. There wasn't any current of traffic there?

A. Yes, sir.

Q. Where was it?

A. It is the usual current of traffic.

Q. Where did it begin, and where did it go, showing the direction?

A. This tower man has interlocking switches in here. He could back an engine over from track 1 onto track 4 and not interfere with track 2 at all.

Q. Well, an engine on track 1 would go down in this direction, going from west to east?

A. The engine on track 1——

Q. Going from west to east?

A. West to east.

Q. That would also be going against the current of traffic, wouldn't it?

A. Oh, no.

Q. Pardon me; just look.

A. That is the current of traffic.

Q. The current of traffic on track 1 is from east to west, isn't it?

A. Yes, sir.

39 If the tower man swung the man down from track 1 going toward track 4, he would not be going against the current of traffic on track 1; he might bring an engine up on track 1, to his tower, and stop him, back him up to track 4 which would be perfectly right.

Q. You say he might bring an engine up on track 1 to this point, opposite his tower. He couldn't do that, could he,

A. Yes, he could.

Q. It would be west of his tower.

A. A few feet west.

Q. It would be 300 or 400 feet west, wouldn't it?

A. Out to the end of the interlocking.

Q. Then he would have to swing down here a bit, wouldn't he?

A. Just clear the interlocking.

Q. And the current of traffic on track 1 would be flowing in that direction, from east to west, wouldn't it?

A. Yes, sir.

Q. And when the engine started down track 1, to swing on to track 2 and then again on to track 4, he would be going against the current of traffic on 1, for the time, wouldn't he?

A. No, sir.

Q. All right.

A. He would stop right at the cross-over. He would take the cross-over, instead of going back on 1.

Q. If a train was left down here close to the tower, they couldn't use that switch at all, could they?

A. Couldn't use any of it.

Q. So if the train was left right near the tower the current of traffic on track 2 would be absolutely blocked, wouldn't it?

A. Couldn't even get up to 6.

Q. The current of traffic would be blocked?

A. Yes.

Q. There wouldn't be any current of traffic from west to east under those circumstances, would there?

A. No, sir.

Q. If they had no current of traffic to provide against on track 4, and you knew it, you could have swung them out on track 4, couldn't you?

A. No, sir.

Q. Do you know of any rule which requires the conductor,—that would require Gillis on that occasion to be at the rear end of those 15 cars?

A. Gillis is in charge of that train.

Q. There wasn't any, was there?

A. I don't know of any rule.

Q. Now as I understand it, you say that some of the men on occasions would feel their way out of the yard, and in such event the conductor would ride on the rear end, or the head end man, I have forgotten which, ride on the rear end of the tender, if it were being pushed out. Did you say that?

A. Why, I said something similar to that. I don't remember just what it was now.

Q. The fact is that some times conductors feel their way out of the yard by going down, riding the tender; or, if the engine
40 is going head on, riding on the head of the engine and watching as they proceed?

A. That is, if they want to do things against—

Q. No, pardon me. I asked you whether that was the fact or not, and not to deliver a speech, or to do things against or for.

A. Well, I can't answer no question like that.

The Court: You may make your answer the way you began to make it.

The Witness: Well, if a man wants to take a chance and do those things himself, without getting any instructions for his own safety, he would naturally feel his way back, and not give the engineer a rush, backup motion, and give the engineer to understand that everything was all right when he didn't absolutely know himself whether it was all right, because he hadn't received any instructions regarding that track.

Q. Isn't it a fact that freight conductors in that yard on occasions had felt their way, by proceeding on the engine, or with the engine, without having first received orders from the yard master?

A. I have known of cases, yes.

Q. You knew that at the time that Gillis was in there?

A. Yes.

I had no control over the conductors except in so far as I could tell them where they should place their cars; the conductor is the boss of that train and was limited only in the way of doing his work by my orders as to where cars should be left. I knew that when he came in there.

Q. Now, as I understand it, when you talked with Gillis on the

'phone, he being in the tower, you then knew that track 8 was filled to a more or less extent with cars, flat cars, on the easterly end?

A. That track 8 was?

Q. Track 8, yes, sir?

A. Yes, sir.

Q. But you didn't say anything to him about it?

A. No, sir.

Q. Didn't warn him against track 8?

A. Had no occasion to.

Mr. McCarthy: I ask that that be struck out and that I get a proper and responsive answer.

The Court: You may answer that question yes or no and your answer may be struck out.

A. No, sir.

Q. The answer was "no"?

A. No.

Q. Now at the inquest you said nothing about going back to the office, to your office there, the yardmaster's office, to attend to telephones, did you?

Mr. Hall: That I object to.

The Court: Was he asked about it?

41 Mr. McCarthy: Yes, sir.

The Court: Then you may ask him from the record.

Q. Do you recall that you were asked this question, "Where did you go when you found Gillis was not there," you answered, "I went back to the office to wait for Gillis to come in with the bills; that is, I was going back and just before I got to the office I heard this crash on track 8." Were you asked that question, and did you so testify?

A. Yes, sir.

Q. Were you testifying to the truth?

A. Absolutely.

Q. Was that the truth?

A. Yes, sir.

Q. Did you have any talk with the rear end brakeman when you got to the end of the 15 cars?

A. No, sir.

Q. You were disappointed at not finding Gillis there; you expected to find him there?

A. I expected to find him.

Q. Why didn't you tell the rear brakeman to go to Gillis and warn him against going down track 8 at that time?

A. Why didn't I tell the rear end brakeman?

Q. Yes.

A. I expected Gillis to come to me, which was his duty.

Q. Well, as I understood it, you said that the rear end brakeman would be working down toward the head end?

A. Might be. His duties would carry him in that direction.

His duties were setting brakes on some of the 15 cars. It was his duty immediately to get on the cars, set the brakes, and in that way be working toward the head end. I said in my examination that Gillis might be working back, from the head end; he might be doing the same thing setting brakes; they might meet somewhere approximately near the center.

Q. And if you had told the brakeman to tell Gillis; warn Gillis against going out on track 8, he could have communicated your message in that way to Gillis?

A. You could touch the cars on track 8 from track 10.

Mr. McCarthy: My question has not been answered; I ask that that answer be struck out.

The Court: That answer may be stricken out and you may answer the question directly.

The Witness: We don't do business with the brakeman on important matters; we do it with the conductor.

Q. That is the only answer you got to make to it?

A. That is my answer.

The Court: It seems that he came on track 10. Was that in consequence of any order that you gave him when he was at tower 180? Did he come in on track 10 in consequence of any
42 order or instruction that you gave him?

The Witness: No, sir, no instructions.

The Court: That is, as far as you are concerned, he picked his track?

The Witness: I lined the iron up for him; he knew by the signals, switch signals, where he was going.

I threw 10 switch; I left the office long enough to go down there and throw the switch; Gillis could have telephoned me from the tower at the other end of the yard, No. 234; he could have asked what way to go out.

Q. You also could have had Gillis called to the tower by telephoning the tower and asking the men to megaphone him and have him come to the tower; then you could have got directly in touch and had him on the telephone?

A. I don't know whether I could or not; the tower man might have had to leave his tower, which they are not allowed to do.

They had signal lights there and a megaphone; they had a megaphone to communicate with the men in the railroad yards at certain distances.

Q. You don't mean to say to this jury that if Gillis were at this end of the yard the megaphone could not have been used to communicate with and reach him in that way, do you.

A. The engine, when it was down here in this vicinity, would be directly under this tower 234, which sets up on the hill. That engine is blowing off steam, and one thing and another. It would be almost impossible for a man to hear a megaphone, or any other kind of noise, from a tower window.

I couldn't say whether the engine was blowing off steam or not

that night; I couldn't say; I wasn't down there; they are always making more or less noise; I don't know what the engine was doing; I wouldn't take the chance of making an attempt to reach Gillis by telephoning the tower and asking them to try and megaphone Gillis and see if they could get him. "The engine would be directly under the tower almost." On the plan it would be 100 feet from the tower to the plug where the engine was taking water. It is very doubtful in my mind whether they could use the megaphone effectively to communicate with a man at that point.

Q. You say it would have been bad railroading to have the tower man call Gillis to the phone.

A. It would have been taking chances.

Q. Chances of not getting him?

A. Yes, it would have been taking chances, yes.

Q. Of course, if they got him, and you reached him on the phone, you could have fixed it all right so he would not have gone out on track 8?

A. If everything worked all right.

43 Q. You didn't try it, did you?

A. We don't take those chances; we are not allowed to.

Q. There is another way in which you could have swung Gillis up, and prevented him from coming down track 8, wasn't there? When you found he wasn't there at the end of the cars where you expected he would be to get the orders to go out on track 6?

A. I don't know any way I could do but do business with the conductor.

Q. You could have swung him up with your lantern, couldn't you?

A. I had no reason to know he was moving.

Q. My question is, you could have swung him up with your lantern?

A. I could not.

Q. You could have gone down from your office to a point between tracks 10 and 8, and walked down toward Gillis, or if you had seen him coming down track 8, or the engine coming down track 8, you could have swung it up with your lantern and stopped its approach, couldn't you?

A. No, sir.

Q. Why not?

A. There is just a space between the tracks the width of the tracks. I couldn't give an effective stop motion there so they could see it.

Q. You could go up on the other side?

A. I would be too far away, for one thing. I couldn't give an effective stop motion.

Q. You could have gone between tracks 6 and 8, where you had an effective field, and swung him up with your lantern?

A. It wouldn't have done any good there.

Q. Could you have done it?

A. I could have got out there; it wouldn't do any good.

Q. You could signal the engine?

A. I could signal the left hand of the engine, but no man in the engine.

Q. The fireman is on the left-hand side of the engine?

A. The fireman is taking care of his fire, probably.

Q. You don't know what the fireman was doing?

A. No, sir, I don't.

Q. The fireman, when he is not doing anything else is bound to watch out under the rules?

A. Not always.

Mr. Hall: Does your Honor think this line of inquiry is helpful?

The Court: I don't think it is unless there is some duty to do these various things he suggests.

Upon re-cross examination, the witness testified:—

Q. Mr. White, you said that from track 10 to track 8 one could touch the cars that were on track 8?

A. Yes, sir.

44 Q. How near to the end of the train were these cars that were on track 8?

A. Why, there wasn't—I don't think over—they ought to be about opposite each other.

Q. What is meant by the term "train order"?

A. Train order is an order issued by the superintendent only, or over his signature, by the dispatchers, to run trains against the current of traffic. That confers a right on a train over an opposing train.

Q. Mr. McCarthy asked you about signalling to the engineer not to come on 8. You had no idea that he was coming on track 8?

A. No, sir, none whatever.

Q. You were waiting for him to come to you for instructions as to what track he was to go out on?

A. Yes, sir.

Q. That was his duty;

A. That was his duty.

Q. To find out from you what track was clear for him to go out on?

A. Yes, sir.

HOWARD I. BARTLETT, called by the plaintiff, testified he was a locomotive engineer employed by the defendant on the Providence Division and was familiar with the route; that he had known Gillis 15 years; that Gillis's train started from Midway, Conn., and the route was through Providence, Attleboro, Mansfield to Readville transfer, thence over the Midland Division to South Boston.

It was here admitted that Gillis at the time of his death was engaged in interstate commerce and that the case is governed by the Federal Employers' Liability Act.

He further testified that the train crew consisted of conductor Gillis, a flagman, a head end brakeman, a fireman and himself; that

he knew Gillis as a railroad man; he was a good man, none better; that he was steady going and never used intoxicating liquors. That his train would start from Boston daily about 8.10 P. M. and arrive in Midway about 1.30 the next morning, where the crew would lay off until 4.40 P. M. of the same day, but on the day of the accident, which was Sunday, a train being ready for them they got out a little earlier, having started at 3.07 P. M.; that on the way to Boston they stopped at Sharon Heights before they reached Readville.

Q. Do you keep in touch with Gillis to find out what the orders are? Does he communicate them to you, as you proceed?

A. The conductor usually does, yes, sir.

Q. So you know what to expect and how to meet it?

A. Yes, sir.

45 That Gillis told him "before we reached Readville that night," he had orders from the train dispatcher to leave his train on main line track 2, at Readville transfer; leave his rear cars there and take his 15 cars into the yard that were billed for Readville; that they stopped the engine at Readville transfer tower numbered 180, about 400 feet west of it; right at the home signal that protects all cross-overs; that they stopped there because the train was so heavy they could not haul it over the hill; that usually when they had cars for Readville, they would "come up here on this track, this track on the extreme right, clear up here; up here to this interlocking; then make the cut of the cars; haul them up here, down over this interlocking; cross over here, and get the signal back here, and back into this yard, into one of these tracks; probably track 18, with those cars, and put them on track 18, "but that on this night having picked up 15 cars at Sharon Heights and having a full train and picking up this extra tonnage, they could not haul it up the hill, so they left the rear end of the train on track (main No. 2) and went in on track 10 with the 15 cars and then was going to back; that they did not make that move very frequently, not that same movement, but they frequently had more cars than they could back over the hill, so the conductor usually called up the yardmaster from Mansfield and made arrangements to pull in on one of those other tracks; either 22 or 24.

Q. 22 or 24 would be on the up-hill—

A. Yes, go in through the same track; go in through track 6, only go up on 22 or 24 and come back through some clear track to the rear end of the train, but this—

Q. Pardon me just a minute. You say you would find out how to get in or get out by communication with the yardmaster?

A. Yes, sir.

Q. That was the custom?

A. Yes, sir.

Q. He might do that some times, from Mansfield?

A. Yes, sir.

Q. So that when he got down here to the Readville yard, he would know where he was going in, how he was going in, and how he was going out?

A. Yes, sir.

Mr. Hall: Well, now, just a minute.

The Witness: Sometimes.

Mr. Hall: Is this from your own personal knowledge or not?

Mr. McCarthy: Pardon me; I don't think that is proper interruption.

Mr. Hall: I think it is.

Mr. McCarthy: I don't think you ought to prompt the witness.

Mr. Hall: I am not prompting him.

46 The Court: The witness ought to understand it is from his own knowledge.

The Witness: Why, that is my understanding. Perhaps I might be wrong, but that is my understanding.

Q. You were familiar with the ways in which the work was done, the railroad work connected with your train, weren't you?

A. Yes, sir; that is as far as my work was concerned.

Q. You were also familiar with the way in which the conductor's work was done, weren't you?

Mr. Hall: That is leading.

Mr. McCarthy: Pardon me.

The Witness: Why——

Mr. Hall: Wait a minute, please.

A. No, I am not familiar with all his work.

Mr. McCarthy: Do you want it struck out now?

Mr. Hall: I want to have an opportunity to object. I do not mind this witness stating what he knows himself, but I do object to his stating things that are hearsay.

The Court: Evidently what the conductor told him is something that was within the conductor's knowledge, and not within his.

Mr. McCarthy: What the conductor told him would be competent.

He further testified that when he was speaking with reference to communicating with the yardmaster he didn't mean Gillis; he was familiar with the way in which Gillis did his work on his train, in so far as it applied to his (engineer's) work; he saw Gillis when at work; saw him when he operated the cars and moved the train and knew how he did that sort of work.

Plaintiff introduced in evidence defendant's rule 544 under title "Enginemen," which reads: "Make the safety of the train of the first importance in the discharge of their duties. Should there be any doubt as to the right of road, or safety of proceeding, from any cause, consult with the conductor and be equally responsible with him for the safety and proper handling of the train, and for such use of signals and other precautions as the case may require. Be vigilant and cautious, not trusting alone to signals or rules for safety."

Q. Now you, of course, in the performance of your duty were looking out to see that everything went right, weren't you?

A. Yes, sir.

47 Q. And, of course, were you or were you not familiar with what was being done in the way of operating the train—and by “the train” I mean Gillis’s train?

A. Well, I was told I was going to leave the cars, yes, sir.

He further testified that when Gillis’s train stopped at the signal he didn’t say anything to him, but just got off the engine and went to the tower; he didn’t know what he got off for; for he went to tower 180; that in coming into that yard, it wasn’t the practice of that train to stop at tower 180 before entering the yard; they usually pulled right by the tower; that it was only when they didn’t go in the usual way that they stopped at the tower; that he didn’t quite recall whether they had a signal to go up track 2, Freight Main, or whether the signals were set at danger; that perhaps he stopped at the home signal, tower 180, because the signals may have been at danger.

His attention having been called to his testimony given at the inquest, he was then asked.

Q. Now, as I bring these matters to your attention, is your recollection refreshed as to why Mr. Gillis went into the tower?

A. Well, I don’t know any more about it than I did then; I presumed he went to the tower to find out where he would put the cars.

Q. That would be the usual thing to do, wouldn’t it?

A. Yes, sir.

That Gillis didn’t remain at the tower very long, just long enough to walk up there and for the head end brakeman to go back, make the cut, and for the engine to pull up opposite the tower. That his train was being followed by one of the fastest trains on the road, number 26; it was not right on his heels, but 30 minutes or so behind him; that when Gillis went to the tower the flagman was flagging back of the caboose in order to protect the train.

That the quickest and most expeditious way to make that move was the way in which it was done; that there was nothing about the move up to that time that was not strictly proper as far as he knew.

That when Gillis came out of the tower he got aboard the engine alongside of him and stood on the brace beam of the tender, between the engine and the tender; that the fireman was on the engine with him; that his position as engineer was on the right hand side; Gillis was on his side; and the fireman was on the left; he could see the fireman from his position; there was nothing between them; that on the way in from tower 180 he couldn’t say what the fireman was doing; he thought he was pulling out some clinkers from the fire and fixing it; that he finished doing this about the time they got

48 down to the water plug; somewhere along there; that Gillis said to him when he came out of the tower, “we will pull in on track 8”; that he didn’t say anything about the track they had to go out on; that the engine was probably moving when Gillis got aboard after coming out of the tower. That on the way from the tower into the yard he saw that the switches were lined up for track 10; that he called Gillis’s attention to it.

Q. What did Gillis say to you when you called it to his attention?

A. He says, "it don't make any difference."

Q. Now, on the way in, you saw the signal was not *for set 8*, but for 10, did you?

A. Yes, sir.

Q. Then what did you say to Gillis? You called his attention to it?

A. I called his attention.

Q. Just what did you say?

A. I says, "The switches are lined up for track 10, A1." "It don't make any difference," he says; "we will go in through 10 and come back through 8."

That as they rode over switch 10 Gillis was alongside of him on the engine in the same place where he was when he got aboard the engine and rode in that position until they stopped on track 10, where Gillis got off, made the cut, and again got aboard, either on the rear of the tender or on the step, and rode down as far as 8 and 10 switch where he got off and then came down to the water plug where they were taking water. That the water plug was about 100 feet from tower 234; that Gillis stayed there until they had finished taking water, waiting for us to take water, which took possibly 3 minutes; that it took them about 10 minutes in making the movement coming from tower 180 down to the time when they took water at the plug.

Q. Then it took about 10 minutes from that point up to the time that you got the water?

A. Well, hardly that. I said ten minutes, but it is hardly ten minutes.

Q. Approximately, then, ten minutes; from eight to ten?

A. Well, it is——

Q. That is near enough. Then what did you do?

A. Why, he gave me a motion to back up, like that. (Illustrating.)

That they reached tower 180 at about 10.15 P. M., when they first stopped; that Gillis gave him a motion to back up after they got the water aboard; he was right alongside of the cab when he gave it. He said to Gillis, "there is no light on the rear end of that tender." That the rules required a light backing through the yard in the night time and Gillis started up there with his light, to get on
49 there; that Gillis got onto the rear end of the tender and stood there while the engine backed up. I said to him, "leave your light there and come up here with me." But he didn't make any reply. He stayed there with his light; that nothing happened until they backed into the car.

He further testified that Gillis gave him a motion to back up and he got out of the cab window, something like this, illustrating; the same as he always did; that when you are backing one of those engines you have got to get your head and part of your body outside the cab to see; that he had his head out of the window watching Gillis; watching for him; that he didn't see anything else until he saw his light going out to one side, and just that instant, simultane-

ously, he felt the shock of the collision with the cars, which were flat cars; one of them came right up over the back of the tender, that is the body part of the car.

He further testified that when Gillis got off at 8 and 10 switch and walked down from there to the water plug, nobody else was in that part of the yard that he could see; that there wasn't anybody there; that the accident happened at 10-25 P. M. and if they had got through track 8 in safety their next move would have been to go down and pick up their train on track 2 and go over the hill to the Midland Division and into Boston; that on the way down to his train he would call the flag man who was probably out a long distance; he would call him by blowing the whistle after he had passed by the yardmaster's office, near the ladder track.

Q. Now, did you notice anything unusual about the movement of the engine, or the way in which that work was being done by Gillis and you, in combination that night, up to the time of the accident?

A. No, sir.

Q. Was it being done in the usual way?

A. Yes, sir.

He further testified he didn't make any examination of track 8 before he went down; that wasn't his business; he didn't know the condition of 8; he wasn't aware that it contained flat cars; he didn't expect he was going to meet with a collision on track 8.

Q. Did you expect you were going to meet with a collision on track 8?

A. No, sir.

Q. Why not?

A. Any more than I always expect to find cars around yards, that is all.

Q. Well, did you think there might be cars on track 8?

A. It is always possible for cars to be on all tracks.

Q. I mean that night, Mr. Bartlett?

A. Why, no.

Q. When you were going in there?

A. No, I didn't look for—I didn't expect to find them there, because I didn't think that the conductor would attempt to go down through a track with cars on it.

50 Q. What information did you think the conductor had that you didn't have?

A. Well, he was in a position to get information.

Q. Well, how?

A. Why, he could go down on the ground and look.

Q. Did he get down on the ground?

A. He was on the ground, yes, sir.

Q. Did he look?

A. I don't know.

Q. How far could he look up that track 8?

Mr. Hall: From what place Mr. McCarthy, may I ask?

Q. From the place where you saw him on the ground.

A. He could look, as far as seeing whether the track was clear or not, by switch lights.

Q. What switch lights?

A. The switch lights at the yard.

Q. Will you point out what you mean, please? You say he was down here, somewhere down near the plug?

A. Down near the plug; here is track- 10, 8 and 6. All these switches—these tracks, are all on a platform at the right of track 6, all the way down, and the night was not foggy; it was clear, and had he got down there and sighted along, he could tell whether there were cars on 6 or on 8.

Q. Just tell us how he could have done it?

A. He could tell by getting down and looking and sighting along. He could tell whether there was cars on 6 or 8.

Q. You mean by the light thrown by the switches?

A. It would obscure the light, if there was cars there; he couldn't see the light.

Q. Just look again, will you? If a man got down here at the end of track 8 and sighted along that track—just follow me now, will you?

A. Yes, sir.

Q. —there wouldn't be anything there in the way of a switch which would help him on that sight, would there?

A. Not on that sight, but he could see them—

Q. Just a minute. The sight which you refer to was to the right of track 8, wasn't it?

A. Yes, sir; there were switches there; there were switches for 8 and track 10.

Q. I understand, but there is a line of switches along here on a platform on track 6, is there?

A. Yes, sir.

Q. Is that line of switches to the right of 6, as you go west?

A. Yes, sir.

Q. That is to say, it would be on the right hand side?

A. Yes, sir.

Q. That line of switches would be on the right hand side of 6, going west?

A. Yes, sir.

Q. So that would carry that line of switches still farther over from the range of track 8, or from the range at a point beginning
51 here and going back over that point?

A. Very slightly; not enough to make any difference, but tracks 8 and 10, switches 8 and 10, are in line; track 8 there is in line with this straight track.

That he didn't see Gillis get down and sight those tracks at all as he was attending to his own work; that when they were going through track 8 just before the accident, they were moving at about 8 miles an hour; the night was clear, dark and cold.

That from the time when the engine stopped at the tower and

Gillis got off up to the time of the accident, the movements were being made in the usual way.

Q. Now, these switch lights that you speak of on track 8, perhaps could be seen from the engine as well as from the ground, couldn't they, if there was nothing to interfere?

A. Oh, yes; yes, sir.

Q. So that, as you looked back, going over track 8, you could have seen along the line of the track; seen switch lights, at the westerly end?

A. No, sir.

Q. Pardon me; I hadn't finished. If there was nothing between you and the switch light?

A. If we hadn't been hauling cars in there, yes, sir.

Q. What's that?

A. If he hadn't had cars behind us, yes.

Q. If you hadn't?

A. If we wasn't hauling cars in there, we could see.

Q. You don't understand me, I guess, or I don't understand you. As you backed down through 8, you were on the engine; just assume now, you were in the cab, and that this is the tender, out here (illustrating).

A. I understand.

Q. You are backing down track 8. Now, as you look along get the range of the tracks, looked back in a westerly direction towards track 8 switch, at the westerly end of track 8, you could see from your point on the engine, if there were any cars between, couldn't you?

A. Yes, probably.

Q. Did you look?

A. No, I don't think I did.

Q. You were facing back?

A. Yes, sir.

Q. Watching in that direction?

A. Yes, sir.

Q. And it was your duty, as much as the conductor's, to see that your engine got out safely?

A. Yes, sir.

Q. And although you were looking in that direction, and had nothing else to do but look and run your engine, you didn't make that observation to see whether the track was clear or not?

A. I was looking to see if it was clear, certainly; I was watching the conductor.

Q. Was it clear?

A. I was watching the conductor.

Q. Was it clear?

A. No, sir.

Q. You didn't see, then, that it was clear, although you said that if you could not see the switch light at the end of track 8, that would have indicated that there was something between you and the switch light, namely, something on the track?

A. Or a switch light out.

Q. Did you see the switch light as you went down through there?

A. I must have, yes, sir.

Q. Did you? I am asking you now for a distinct recollection.

A. Why, probably I did; I don't recall it now. If I called the attention of the conductor, and told him the track was lined up for 10, I must have seen the switch.

Q. No, no; we are backing down now. As you backed through 8, looking back in the direction of the westerly end of 8 track, and towards 8 switch, did you see the switch lights burning on that track?

A. I don't remember now.

Q. Don't remember anything about it?

A. No.

Q. Were you watching out to see whether there was any obstruction on that track?

A. Yes, sir.

Q. And the night was clear?

A. Yes, sir.

Q. And if a man had looked properly in the direction in which you were looking, he ought to have seen obstructions, if they were there?

A. Why, yes; a man on the rear end of the tender had.

That a man on the engine could not see any obstruction; what he meant to say was that a man from the engine could not see any obstruction any great distance; couldn't see cars any great distance from the cab; he could see them a very short distance. He doubted if he could have seen them over a car length, if he did that; he didn't see the cars on track 8 until they struck them; he didn't recall that he saw the switch light on the westerly end of track 8 that night and didn't recall seeing the obstruction that was on 8; he didn't know anything was there although he was looking in that direction, until he hit it; when the collision occurred he got right off the engine and went down alongside the tender to Gillis, picked him up, carried him to the gangway of the engine, the fireman got him by the shoulders and they lifted Gillis onto the engine. He thought the yardmaster and the car inspector arrived at that time.

Q. Then the yardmaster reached there very quickly after the collision occurred?

A. Well, possible I struggled a little time; took a little time to get him along to the gangway.

Q. That is, from the rear end?

A. Yes, from about the rear end of the tender, a few feet, anyway.

That the gangway was the space between the tender and the cab of the engine; they had Gillis on the engine before the yardmaster and car inspector came along; that they must have, or the yardmaster and inspector would have assisted in putting Gillis on the engine; they arrived there shortly after Gillis was put on the engine. He started the engine right away after Gillis was put aboard. The vardmaster and inspector arrived before the engine was started; they took Gillis to the Readville depot, marked on

the plan Readville station; he was dead when they got there, but was alive when they first picked him up. The yardmaster went down to the station; that he really couldn't say whether the yardmaster rode down on the engine or not, but the head end brakeman was there. Gillis's body was left at the station in charge of the yardmaster; that he backed from Readville Station over track 4, going west until he came to the interlocking switch near the plug; that he had a signal there; there is a dwarf signal there and from there he went up and out over track 6.

Q. Who told you to do that?

A. The yardmaster, I presume. I don't remember now, but he probably told me to.

He further testified that he recalled that Gillis said to him when he got on the train after coming out of tower 180, "we will go in on 8 and come out on 10."

Upon cross-examination the witness testified: I have been a locomotive engineer fifty years and run on all kinds of trains, express and accommodation, freight and passenger. Gillis was a friend of mine; he was an experienced railroad man, familiar with all parts of the Readville yard. He had a book of rules and was familiar with them.

On this particular Sunday night, it was so arranged that we could get home a little earlier. They had the cars in the Midway yard ready to go, so they made the train up so we could get out of there earlier. It made a difference of two hours, at least. We would have got in about 11 o'clock that night instead of 2.30 on Sunday morning. When Gillis told me that we would go down on 8, I came along and observed that the tracks were lined up for 10, and I told him so. He said, "that don't make any difference; we will come out on 8." Then we came by the yardmaster's office, went up and stopped before we got to switch 10. At switch 10, at that time, the signal was green, meaning that we could go on to the lead. That is, 10 switch was lined all right for us. That permitted us to go down as far as the signal, so we could have gone clear up to track 4, if we had wanted to. By "the signal" I mean the semaphore signal. We stopped at a point that would be west of the 10 signal. Then the conductor left the engine and got down to make the cut between the head car and the engine. He was then on the ground and we moved ahead over switch 8 and 10.

54 Q. Then the conductor threw the switch for 8?

A. Yes, sir. I say yes, I didn't see him throw the switch. He probably threw the switch.

Q. No one else to throw it?

A. There was no one else to throw it.

Q. And it had to be thrown in order for you to get back there?

A. Yes, sir.

Q. And he had already told you that you were going down on 8?

A. Yes, sir.

Then I went up beyond here to the water plug and got water. The conductor walked up from switch 8 and after I had gotten water at the plug he gave me the motion to come down—the back-up

motion, swinging his lantern in a half circle. He then took his position on the beam of the tender, which is just even with the floor of the tender, our engine being a road engine, and his position at the rear end of the tender. The signal was set for me to come in on 8 and there was no one else except him to set that signal for it. He had already told me to go down on 8, and it was his business to see that track 8 was clear.

Rule 502 put in evidence: "Engine Men. They will be responsible for the proper care and management of the engine, and will see that all tools and signal appliances to be carried on the engine are complete and ready for use. They will be responsible for the exact observation of all signals and other precautions established for the safety of trains; for the avoidance of all risk; for the regulation of speed between stations; for the charge and safety of the trains, if the conductor is disabled, until properly relieved; for the examination of bulletin boards before starting each day; for the proper working of the air brake and the whistle signals; also for keeping the ash pan, smoke arch and stack in good order; for prompt report of all accidents, fires, irregularities or violation of rules on the part of any employee; for the proper conduct of firemen."

Rule 500 was put in evidence: "Engine Men. On the road, obey orders of the conductor as to starting, stopping, shifting cars; as to general management of the train, unless such orders endanger the safety of the train or would require a violation of the rules or cause injury to persons or to property."

Rule 615 was offered in evidence: "Conductors. Be responsible for all switching movements; leave all cars on sidings in perfectly safe order, hand brakes set and derail switches open, and full clearance given to main tracks."

Rule 103 was offered in evidence: "Conductors. Conductors will be held responsible for the proper position of the switches used by them and their train men, except where switch tenders are stationed."

55 There was no switch tender stationed at switch 8 or 10. It was no part of my duty to throw the switch on track 8. It was the conductor's duty, if he was there, or the trainman who happened to be there.

Q. Now, was it not the practice on that train, Mr. Bartlett, for the conductor to deliver his bills to the yard master.

A. Yes, sir.

Q. As you had observed it?

A. Why, I don't know that I had observed it.

Q. Well, if you hadn't observed it, I don't want it.

A. Yes, whenever I have been where I could see him. Of course, he has to deliver his bills to the yard master wherever he leaves cars.

I had never gone to the tower and obtained from the yard master permission to go into the Readville yard unless I had an engine alone. Whatever may have occurred between the yard master or

the tower man and the conductor is something that I have no personal knowledge of.

Q. And your testimony as to what may have occurred as to conversation between the conductor and the yard master or the tower man is purely hearsay, or inference?

A. Yes sir.

Mr. McCarthy: I pray your Honor's judgment as to that; I suppose that is for the court.

The Court: Well, he has answered. The only instance to which that could refer has already been explained fully, where he said he inferred.

Q. Now Mr. Bartlett, when you had been told by the conductor to come back on 8, the switch had been thrown by the conductor for 8; he had given you the motion to come back on it?

A. Yes, sir.

Q. What observation was it your duty to make as to the movements of your engine?

A. My duty was to watch him.

Q. And why should you watch him?

A. Because, I am under his orders as far as movements in the yard are concerned, and he was in a position to see a good deal more than I was as to how the track—whether all right or not.

Q. How does he tell you; how does he communicate with you as to the speed of the engine at those times?

A. He has a lantern in his hand. If he wishes that train slowed down, all he has to do is to hold the lantern steady, outside the cab; that means slow down.

That on the night of the accident he was looking towards him to see if he gave any signal.

Q. You were not looking down track 8, 1200 or 1300 feet away for any switch-light.

A. No, sir.

56

He further testified that he hardly thought he could have seen any light if there had been any from his position on account of being on that side where he had left cars on track 10; at all events his attention was upon the conductor who was there for the purpose of giving him the signals as to moving and as to stopping; when that switch showed safety at 8 it showed him he had a right to go in there; he had no knowledge that there were any cars on 8; it was the duty of the conductor to ascertain whether there were any cars on track 8.

Q. Mr. McCarthy asked you whether the movements were being made in the ordinary way that night, and you said yes. What movements did you refer to?

A. Why, the movements in regard to leaving cars on 6, 8 and 10.

When asked what he meant by movements in the usual way, he said, "We hauled in on track 10. We were supposed to go back on some clear track. That is just all there was; that is all there was to that movement."

He further testified that he ordinarily got instructions as to what track he was to back out on from the conductor; "he set the switches, and gave me a motion. He didn't always tell me where he planned to go back on; he would line up the switches and give me a motion to go"; that he should say the yardmaster came to him about 3 minutes after he (the witness) heard the collision; "just about the time that we got Gillis onto the engine"; he could not say exactly how long it was.

He further testified that the night was so dark you couldn't see ahead of you more than a car length.

On re-direct examination he testified that he didn't see Gillis throw 8 switch; that he didn't know whether Gillis threw switch 8 or not; that he didn't say that he did know because he didn't see him throw it.

He further testified that when he would have an engine alone he would go into the tower when about to enter the yard; that there had been such occasions as that; he meant any tower; he would perform the duties assigned to a conductor when there was no conductor assigned to the job.

Q. If you, when you had your engine alone, performed the conductor's duties, you perhaps were familiar with the conductor's duties, were you?

A. Well, to some extent.

Q. And when a conductor comes into a yard and is about to enter the yard, where he does not know anything about the conditions, you know that he usually goes to the tower and communicates with the yard master to find out the conditions before he goes in, don't you?

A. In regard to leaving cars, yes.

57 Q. In regard to getting in and getting out, isn't it?

A. Well, that would depend on the yard, and the location, etc.

Q. Take the Readville transfer yard.

A. Well, there is some times we go in there, and if we could see that everything was all right——

He further testified that he didn't know what a conductor would do when he approached the yard which he was about to enter with some cars where the conductor was not familiar with the conditions which obtained in the yard.

WILLIAM J. GALLAGHER, called by the plaintiff, testified as follows: I am a police officer and was employed by the New York, New Haven & Hartford Railroad Company two and one-half years ago; I was in Gillis's crew on the night of the accident; I had been running on that train two or three trips before the accident and had been a brakeman a little over a year; I had spent off and on six months in the First Street yard; I would go somewhere else on a job and that would be about all the work I did; I was head end brakeman on the train. When the train came into the tower, I stepped off before it stopped and went to the rear end of the 15 cars; I cut them off and then walked back up toward the head end

of the train; I stood right there, a few cars from the engine; I eventually boarded the train and went right into the yard; I caught the rear end of the train and rode on the rear end into the yard down to track 10; the middle of the train stopped about opposite the yardmaster's office; the end of the train was in to clear, that is, she wouldn't be obstructing the entrance of cars going in on 8 or any other track; I didn't see the yardmaster until after the accident; I was setting the brakes on the train at the rear end of the train; I first saw the yardmaster when I went up to the engine after the accident and saw him standing there. That he didn't go by the yardmaster's office on the train; that when the train came in there and stopped on 10, he set the brakes on the cars. He continued saying, "in doing that I went toward the head end; I don't think I went by the yardmaster's office, I didn't take much notice; I went up towards the head end, 15 cars, and set the brakes on about 4 of the 15; they were down at the rear end; I didn't take any particular notice whether I was opposite the yardmaster's office at that time; after I set the 4 brakes I got down, walked over to the rear end of the cars and walked over on track 6; I can't swear on which side of the train I got down; I have no recollection about it; I did say I got down and went around the end of the cars which were brought in; I think I was mistaken, because I don't remember which side I got off of, but when I got down I went around the end of the cars which was on 8, and went over to 6; that is, I would go down to the end of the cars I brought in, that is what I
58 meant, down toward the end of the cars I brought in after setting the brakes; I don't remember whether I went around the end of the cars I brought in; I went around the end of the cars on 8 and went over onto track 6. I sat down there and waited; when the engine left the water plug and backed into the track again I walked over, back again, toward 8 and 10 track, between 8 and 10. When I got down onto 6 after rounding the cars there on 10 or 8, and sat down on track 6 and waited for them to come, the engine was then way down to the plug.

Q. You could see it, nothing to interfere with your view, was there?

A. No, sir.

Q. Did you see it as it backed from the plug on 8?

A. Yes, sir.

Q. Did you have a lantern with you?

A. Yes, sir.

Q. Did you use it?

A. Well, I didn't use it then, no.

Q. You knew at that time that there were cars on 8, didn't you?

A. Yes, sir.

Q. Because you had walked around them?

A. Yes, sir.

Q. You saw the engine as it came in on 8?

A. Yes, sir.

Q. You didn't make any attempt to signal the engine, did you?

A. No, sir.

Q. Or to stop it from coming in on 8?

A. No, sir.

Q. Although you had a lantern in your hand?

A. Yes, sir.

Q. Didn't you appreciate that if the engine continued to back down 8 there would be a collision?

A. I didn't know where they were going to back down; I didn't know whether they were going to back down 8 or 10.

Q. I understood you to say you saw the engine when it came in on 8.

A. I see it back in there, yes.

He further testified, I was 15 car-lengths away from the place where the collision occurred when the crash came; I might have been 2 cars from the end, but I was right down at the end; I was between 12 and 15 cars away from the point of collision at the time of the crash; I got down to the scene of the accident as soon as possible; in less than a minute; I ran down there and when I got there found the fireman, engineer, conductor, the yardmaster and car inspector there ahead of me.

Upon cross-examination, the witness testified:—I have been on the police force for two years. When I was at the rear of the cars that went on 10 I should say the end of the cars was about 6 or 7 cars from the yardmaster's office; the rear end was toward the west; I should say that the cars were to the west of the yardmaster's office; I was setting the brakes as they were almost pulling in, before they actually stopped, as soon as the cars got into clear.

59 I was not on the ground, but on the top of the car; I wouldn't have had any opportunity to see the yardmaster, whether he was there or not; after I had set the brakes on the four cars, I got down and saw that there were cars on 8; I went around these cars on 8 on to 6, expecting the cars would come back on 6; that track was clear; I didn't see any cars there, but I did see them on 8.

Q. Now, do you know where Mr. Gillis was at that time while you were on top of the cars setting brakes?

A. Well, he evidently was cut off before I had set the brakes on the whole four cars.

The only people on the train that were left up toward the engine were the engineer, fireman and Gillis. The flagman was out on the track. I didn't throw the switch for 8, for the engine to come back on 8; I was way down below the yardmaster's shanty on 6 track.

Upon re-direct examination the witness testified that a stop motion was made by swinging the lantern vertically across the body.

SYLVESTER LAWRENCE, a witness called by the plaintiff, testified as follows:—I have been a fireman for five years and had worked on Gillis's train for about three months as fireman. When the train reached the tower I was fixing the fire; I had finished before the train started again; after the train started leaving the tower with 15 cars and going up 10 I was cleaning; pulling clinkers out of the fire box; after that I opened the door and put in new clean

coal; that took me 2 or 3 minutes; I put in perhaps 4 shovelfuls of coal; I got up on the seat then and sat down; after sitting down I looked ahead, and kept watch; I was looking out all the way down track 10.

Q. Keep watch?

A. I did.

Q. Were you looking out all the way down track 10?

A. I did, yes, sir.

Q. On your side?

A. On my side.

Q. Track 10 is pretty close to track 8 there, isn't it?

A. Yes, sir.

Q. Did you notice the cars on track 8 that night?

A. No, sir.

Q. As you went down?

A. No, sir.

Q. You heard the yardmaster testify they were so close to track 10 you could have touched them, didn't you?

A. Yes, sir.

Q. Did you see any cars as you went in so close you could touch them on track 8?

A. I didn't notice them. After I cleaned my fire, I had my fire to attend to; I was busy on the fire-box.

Q. Never mind about that; when you were sitting on the seat there,

A. No, sir; I didn't notice them.

60 Q. You were looking out straight ahead, as you went down 10?

A. Sure.

Q. If there was anything on the left of you that could have been readily seen, you would have seen it, wouldn't you?

A. I guess I would; I didn't notice any.

We went down and took water. At the time of the collision I was on the top of the tank; I was shovelling over coal. The night was dark. I couldn't see across this room from the top of the tank; the light was shining in my face, that is, the light from my torch.

At the inquest I said in response to a question that the night was "awful dark, I couldn't see two feet ahead of me"; that was a fact. We were moving down 8 from between 8 and 9 miles an hour; that is a rough guess. When the crash came I saw the splinters; they didn't come far from my head.

GEORGE A. KELLEY, called by the plaintiff testified: I was a police officer stationed at Hyde Park; my route took me down near the Readville yard; I have been several times while the men were engaged in freight trains and cars in and about Readville, I have been in the vicinity of the tower, which is near the Midland bridge, that is behind the Readville depot, there is a plug down there; the tower is numbered 234 on the map; I have been there lots of times when they were using a megaphone in connection with their work on the trains; that up in that district in the stillness of the night you can

hear at all times; that sometimes the wind would blow east or west; you could hear it more plainly than other times; when we would make our rounds we could hear the megaphone quite distinctly, that is, we would stand around there for a while and hear everything going on. I have heard the megaphone at a distance of 50 feet, sometimes 200 feet away, over in Wolcott Square I could hear it.

Q. Then you heard it at varying distances, from 50 to 200 feet from where the voice was?

A. Yes.

Q. Under varying conditions, I suppose?

A. If the wind was blowing in my direction at that time.

Q. Do you remember this night, whether there was any wind or not?

A. No, I think that was a sort of misty night; Sunday night.

Q. And no wind?

A. Not that I recall.

Q. Did you ever notice that they used the megaphone when engines were puffing about there?

A. Repeat that again, please.

Q. Did you ever notice that they had been using the megaphone when engines were about there, puffing?

A. Yes.

Q. And blowing off steam?

A. Yes.

61 Upon cross-examination the witness testified.

(By Mr. Hall:)

Q. I don't suppose you heard very much of the megaphone when the engine was blowing off steam?

A. Well, when I would be making my rounds——

Q. Please answer my question. You wouldn't hear very much on the megaphone if the engine was blowing off steam.

A. Depends on the spot where I was at the time.

Q. You don't want to go on record, on your oath, as saying this was a misty night?

A. It might have been raining a little bit.

Q. It might have not been misty, too?

A. I think it was.

Q. Have you any recollection one way or the other?

A. Yes, in talking it over afterwards with the men.

Q. I am not talking about talking it over afterwards. I mean, of your own recollection.

A. It had been misting a little bit the early part of that night, because I was on the Sprague Street bridge.

Q. You know that do you?

A. Yes.

Q. How long have you remembered that?

A. Just as plain as the night it happened.

Q. You are as accurate about that as you are the rest of your testimony?

A. Yes.

The plaintiff here offered a certified copy of the report made by the defendant to the Industrial Accident Board, relating to the case, as to the cause of the accident, made by and in behalf of the defendant and signed by its proper officers. The evidence was objected to by the defendant.

Mr. McCarthy: I desire to offer it as an admission by the defendant as to the cause of the accident and the sole cause of the accident and the conditions on track 8.

The Court: You may mark on the report the portions you wish to offer.

Mr. McCarthy: I offer the whole thing. I offer this evidence as tending to contradict the claim made by the defendant that the accident was caused in whole or in part by the contributory negligence of Gillis. I also offer it as tending to prove the damage because of the accident. I also offer it as tending to prove that the defendant admits that there was nothing but flat cars on track 8.

Plaintiff's counsel then designated as the part of the report which he wished to offer in evidence, which reads:

"3. Describe fully how injury occurred. Engine 285 of train M. B. 4 had dropped 15 cars on track 10 Readville transfer 62-64 yard and was backing through track 8 with conductor Gillis riding on back of engine tank and struck cars on track 8. He was thrown to ground and instantly killed. Cars on 8 were flats and not readily seen."

The Court excluded the testimony and the plaintiff excepted.

The plaintiff also offered evidence tending to prove that the deceased left a widow and several minor children surviving him, who, at the time of his death, were dependent upon him. She also offered evidence tending to prove that the said widow and children had been deprived of a reasonable expectation of pecuniary benefits by the death of the said Gillis and the amount of the actual financial loss thus sustained by them.

The foregoing was all the evidence material to these exceptions.

At the close of the evidence defendant asked the Court to rule that upon all the evidence the plaintiff was not entitled to recover, and to direct a verdict for the defendant. The Court so ruled and directed, subject to the objection and exception of the plaintiff, with the stipulation of the parties that the case is to be reported for the determination of the Full Court with the further stipulation that if the ruling and direction were right, then judgment is to be entered for the defendant. If the case ought to have been submitted to the jury, then judgment is to be entered for the plaintiff in the sum of Forty-five hundred (\$4,500.00) Dollars.

I now report the case for determination by the full court.

LLOYD E. WHITE,

Justice Superior Court.

Filed Feb. 23, 1916.

Copy.

Attest:

FRANCIS A. CAMPBELL, *Clerk.*

65 [Endorsed:] No. —. Mary E. Gillis, Admx., vs. New
York, New Haven & Hartford Railroad Company. Report.
Suffolk County.

66 On which said Report the following was endorsed, to wit:
"Assented to. John L. Hall, Atty. for deft."

Thence the case was continued, to await the decision of said Court,
unto the twenty-sixth day of June, 1916, when, on said day, the
following Rescript was received in our said Superior Court, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, June
23, 1916.

In the Case of—

MARY E. GILLIS, Admtrix.,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Pending in the Superior Court for the County of Suffolk.

67 Ordered, that the clerk of said court in said county make
the following entry under said case in the docket of said
court; viz:

Judgment on the verdict.

By the Court,

C. H. COOPER, *Clerk.*

June 23, 1916.

Brief Statement of the Grounds and Reasons of the Decision.

Opinion herewith.

Thence the case was continued unto the third day of July, 1916.

And now on said third day of July, A. D. 1916, it is considered
and ordered by the Court that judgment be entered for the New
York, New Haven and Hartford Railroad Company, Defendant,
as aforesaid, against Mary E. Gillis, as she is the Administratrix
of the estate of Alexander J. Gillis, deceased, Plaintiff, as afore-
said, for its costs of suit taxed at one hundred and thirty-two dollars
and seventy-nine cents.

68 All and singular which premises we have held good by
the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior
Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this tenth day of January in the year of our Lord one thousand nine hundred and seventeen.

[Seal The Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

Superior Court.—No. 72583.

MARY E. GILLIS, Administratrix,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Docket Entries.

Counsel for plaintiff.		Date.	No.	Counsel for defendant.	
J. Action of Tort. Ad damnum \$40,000. Disposed of July Sitting, 1916.	James J. McCarthy.	1913, 7 Apl.		Entered.	F. A. Farnham. Choate, Hall & Stewart. September 5, 1913.
	Trial List.			Declaration filed.	Trustees.
	Oct. Gen., 1913.	Apl. 7.	1.	Plaintiff's jury claim.	1. 2. 3. 4. 5. 6.
	Oct. Gen., 1914.	May 6. 1915.	2.	Answer.	
		Apr. 30.	3.	Additional answer by consent and leave.	Counsel for Trustees. 1. 2. 3. 4. 5. 6.

70

Docket Entries (Continued.)

Date. No.

1915.

May 3. 4. Verdict for defendant, by direction of Court.
Case to be reported to Supreme Judicial Court.

1916.

Feb. 23. 5. Report to Supreme Judicial Court.

June 26. 6. Rescript from Supreme Judicial Court:
"Judgment on the verdict."

July 3rd. Judgment for Defendant.
Costs—\$132.79.

1916.

Dec. 23. 7. Petition for Writ of Error.

Dec. 23. 8. Assignment of Errors.

Dec. 23. 9. Prayer for Reversal.

Dec. 23. 10. Order granting Writ of Error.

Dec. 23. 11. Writ of Error from United States Supreme Court.

Dec. 23. 12. Citation returned with service accepted.

Dec. 23. 13. Bond, approved and filed.

(January 10th, A. D. 1917.)

Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

71 *Copy of Opinion of Supreme Judicial Court for the Commonwealth.*

72 COMMONWEALTH OF MASSACHUSETTS:

Boston, January 6, 1917.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Mary E. Gillis, administratrix vs. New York, New Haven & Hartford R. R., decided on the 23rd day of June, 1916.

HENRY WALTON SWIFT,
Reporter of Decisions.

73 LORING, J.:

This is an action under the federal employers' liability act* brought to recover for the death of a freight conductor in the defendant's employ. The accident happened in the Readville transfer yard. The administrator called to the witness stand the yardmaster of that yard, and the engineer, fireman and head brakeman of the train. He also put upon the stand a Hyde Park policeman whose testimony has no bearing on the case. Upon the conclusion of the plaintiff's evidence, the presiding judge ruled that the plaintiff was not entitled to recover and directed the jury to find

74 a verdict for the defendant and reported the case for determination by this court.

The facts disclosed by the plaintiff's evidence were as follows: The Readville transfer yard is a yard some four thousand feet in length used for the distribution of freight cars. The entrance to the yard at each end is controlled by an interlocking switch tower. The tower first reached by a train running east is tower 180, and that at the other end is tower 234. The yardmaster's office is situated some twenty-six hundred feet beyond tower 180 and about fourteen hundred feet short of tower 234. At that point there are eighteen tracks in the yard, seven (not including a short spur track) in front and eleven behind the yardmaster's office. The train in question was bound for the South Boston freight terminal of the defendant railroad, having started from Midway, a point in Connecticut on or reached by the Providence division. The Providence division is a two track road until this yard is reached. A freight train bound for the South Boston terminal leaves the east bound passenger track of the Providence division at tower 180 and runs on the main east bound freight transfer track No. 2 which skirts all the tracks behind the yardmaster's office and farther on connects with one of the tracks of the Midland division. The tracks of the Midland division cross the tracks of the Providence division on an overhead bridge at Readville beyond tower 234. From this it appears (and it was a fact) that a freight train coming from a point on the Providence division bound for South Boston freight terminal had to climb a hill between tower 180 and the connection between the main freight transfer track and the tracks of the

75 Midland division. The train in question left Providence with thirty loaded freight cars bound for the South Boston

*35 U. S. Sts. at Large, c. 149, as amended by U. S. St. 1910, c. 143. The parts of that statute here material are as follows: s. 1. "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, * * *." s. 3. "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, * * *."

freight terminal. Between Providence and tower 180 it had to take up fifteen more. These were bound for the Readville transfer yard to be distributed from there to various stations in the neighborhood.

Under these circumstances the deceased before leaving Providence went to the train dispatcher there and asked him (the train dispatcher) to give him (the deceased) permission on arriving at tower 180 to leave the thirty cars of his train bound for the South Boston freight terminal on the main passenger track while he left the other fifteen cars in the Readville yard. The reason why he did this was because the train of forty-five cars was too heavy a train to haul up "over the hill."

Under these conditions the deceased came to tower 180 at about quarter past ten o'clock at night. At that point he stopped his train; he went into the tower and called up the yardmaster by telephone and said to him: "'I have a heavy train, forty-five cars. I don't think my engine can haul them over the hill,' or 'haul them up track 2.' * * * 'I have obtained permission from the Providence Division Dispatcher to drop my train on the main line if you will allow me to pull into the yard.'" To which the yardmaster said: "'All right Al, I will line up one of the clear tracks in front of the office to pull down and drop your fifteen cars.'" Thereupon the yardmaster examined tracks 10, 8 and 6 which lay directly in front of his office. It was a Sunday night and on Sunday nights the

yardmaster had no assistant. He found that tracks 10 and 6
76 were clear, but that there were some cars on track 8. Thereupon he set the switches for the deceased's train to take track 10. After setting the switch he waited there about two minutes and as the deceased came along with his train "I gave him the hand signal from some point right around 10 switch. * * * It is a 'come on' signal."

On leaving the tower the deceased boarded the engine and as they went forward he said to the engineer, "We will go in on 8 and come out on 10." When the engineer saw that the yardmaster had set the switches for the train to go in on 10, he said to the deceased, "The switches are lined up for track 10," to which the deceased answered, "It don't make any difference, we will go in through 10 and come back through 8."

The deceased stopped his train of fifteen cars so that the middle of it was about opposite the yardmaster's office. It was his duty then to go to the yardmaster and deliver to him the waybills for the fifteen cars which were to be distributed from the Readville yard. On the train stopping opposite his office, the yardmaster went to the rear of this train of fifteen cars, expecting to see the conductor there and to receive from him these waybills. On arriving there he did not find the conductor. Thereupon he returned to his office.

When the fifteen cars had been brought to a standstill, the conductor got down from the engine and cut them off. He then boarded the engine again and rode on it to the other end of track 10. When
77 the engine reached this point he again got down and went to No. 8 switch and set that switch so that the engine could come back on track 8. While he was doing this, the engine went

on to the "water plug," which was farther on toward tower 234, and he waited for the engine to come back. When the engine had taken water it came back to No. 8 switch and the deceased then boarded the engine. The engineer said to him, "there is no light on the rear end of that tender." By the rules of the road no engine can back down without a light on the tender. Thereupon the conductor boarded the rear end of the tender and stood there with his conductor's lantern while the engine backed down on track 8 until they came into collision with the cars upon that track which were some two hundred and fifty feet in from the switch. When the engine came into collision with these cars, the front ones (which were flat cars) rose up over the tender and struck the deceased. He was immediately carried to the Readville station, but died before he arrived there.

1. The first contention made by the plaintiff is founded upon the fact that the deceased told the engineer when they were on the engine after leaving tower 180 that they were to go in on track 8 and come out on track 10, and that when the engineer, seeing that the switch had been set for the train to go in on track 10, told the deceased that, he said "It don't make any difference, we will go in through 10 and come back through 8." From the fact that the deceased made these statements to the engineer, the plaintiff contends that the jury were warranted in finding that in the course of

the conversation which the deceased had with the yardmaster over the telephone while the deceased was in tower 180 the yardmaster had told the deceased to go in on track 8 and come out on track 10. In support of this contention the plaintiff has relied upon the case of *Nagle v. Boston & Northern Street Railway*, 188 Mass. 38. But that decision does not support this contention. In *Nagle v. Boston & Northern Street Railway* what the deceased said was that the car starter had told him to take the track which he took. If the engineer had testified that what the deceased said to him was that the yardmaster had told him to go in on track 8 and come out on track 10, the case at bar would have come within the decision in *Nagle v. Boston & Northern Street Railway*. But in the case at bar the engineer did not testify that the deceased told him that the yardmaster directed him (the deceased) to go in on track 8 and come out on track 10. Of course the jury could disbelieve the testimony of the yardmaster although he was put on the witness stand by the plaintiff, if there was any evidence to contradict him. But there was none. The fact that the deceased said that he was going to take a certain course after he had the conversation with the yardmaster is not evidence that the yardmaster told him to take that course of action.

So far as the direct testimony goes, the yardmaster told him that he would "line up" a track for him without telling him what track he would "line up," intending to find out what tracks were clear and then "line up" one of them for the deceased.

2. The plaintiff's second contention is that the jury were warranted in finding that the yardmaster was negligent because

79 he returned to his office to attend to his duties when he failed to find the conductor at the rear end of the fifteen cars. His contention is that when he found that the conductor was not at the end of the fifteen cars he ought to have gone out into the yard, found him and told him what track to come back on. But the jury were not warranted in making that finding. The yardmaster's duty was at his office. He was not only the yardmaster of this yard but of five others. He did not know what call would come to him next. It was his duty to be at his office or in that immediate neighborhood so as to respond to any call as to the conduct of the yards under his control. More than that he had no reason to suppose that the deceased would undertake to use any track in the yard without getting permission from him to do so. Under the rules of the company the deceased had no right to use a track in the yard without permission from the yardmaster. And lastly, it was the duty of the conductor to bring the way bills (which showed where the fifteen cars to be left in the yard were to be sent to) to the yardmaster, and it was the duty of the yardmaster to remain at his office to receive them.

The difficulty with the plaintiff's argument is that in this instance, and throughout his whole argument, he asks the court to judge of the character of the action of the defendant's employees in the light of what transpired afterwards, and not in the light of the conditions which confronted the employees at the time they took the action which the plaintiff complains of. It goes as a matter of course that if the yardmaster had known what the deceased was going to do he

80 ought to have taken means to stop it. But the yardmaster had no reason to suppose that the deceased would do what he did in fact do. It was his duty (as we have said before) to remain at his office to answer any calls which might come to him for the conduct of this and the other yards. There is nothing in the cases cited by the plaintiff in this connection, (*Grant v. Union Pacific Railway*, 45 Fed. Rep. 673, 680; *Evans v. Detroit G. H. & M. Railway*, 148 N. W. Rep. 490; *Texas & New Orleans Railway v. Tatman*, 10 Tex. Civ. App. 434, 435,) which helps him.

3. The answer to the next contention made by the plaintiff has already been given. That contention is that, when the yardmaster on going to the rear end of the fifteen cars did not find the deceased, the jury were warranted in finding that he ought to have telephoned to tower 234 and told the tower man to tell the deceased through the megaphone not to come back on track 8. The conclusive answer, as we have already intimated, is that the yardmaster had no reason to suppose that the deceased would undertake to come back on track 8. An additional answer (if one were necessary) was given by the yardmaster in his testimony, namely, that it is bad railroading to send orders through a third person, and not only that, but through a third person who has to speak through a megaphone to deliver the order to be transmitted by him.

4. The next contention made by the plaintiff is that the yardmaster ought to have warned the deceased that there were cars on track 8 when he first spoke to him over the telephone while the deceased was in tower 180. But that would have been bad

81 railroading, as the yardmaster testified. It was not proper for him to tell him to use a particular track until he found by actual inspection that the track was clear. That was the course pursued by the yardmaster. He gave permission to the deceased to come into the yard and told him that he would "line up" a track for him to use. Thereupon he left his office. He examined the tracks which were lying in front of it. He found that 10 and 6 were clear and 8 was blocked. Thereupon he set the switch for 10 and signalled the deceased to come in on 10. Under the course of action properly adopted by the yardmaster, it was the duty of the deceased to come to him to ascertain what track he was to use in going out.

5. The next contention of the plaintiff is that the engineer was equally culpable with the deceased conductor under the rules. The plaintiff's contention here is that the rules make the engineer equally responsible with the conductor for the safety and proper handling of the train. This contention is based upon rule 544. That rule provides: "Make the safety of the train of the first importance in the discharge of their duties. Should there be any doubt as to the right of road, or safety of proceeding, from any cause, consult with the conductor and be equally responsible with him for the safety and proper handling of the train, and for such use of signals and other precautions as the case may require." That rule must be read in connection with Rules 500 and 615. So far as material, Rules 500 and 615 are as follows: "Rule 500 * * * 'Engine Men. On the road, obey orders of the conductor as to starting, stopping, shifting cars;

82 as to general management of the train, unless such orders endanger the safety of the train or would require a violation of the rules or cause injury to persons or to property.' "

"Rule 615. 'Conductors. Be responsible for all switching movements.' "

6. The plaintiff's next contention is that the engineer was negligent because while he was backing down on track 8 he testified he was leaning out of his cab and looking at that track and he ought to have seen the cars. The engineer testified that he was watching in that direction, and it was his duty as much as the conductor's to see that his engine got out safely. When asked this question, "And although you were looking in that direction, and had nothing else to do but look and run your engine, you did not make that observation to see whether the track was clear or not?" he answered, "I was looking to see if it was clear, certainly; I was watching the conductor." He then was asked this question: "And if a man looked properly in the direction in which you were looking, he ought to have seen obstructions, if they were there?" to which he answered, "Why yes; a man on the rear end of the tender had." This answer taken in connection with the rules of the railroad disposes of this contention. It was the duty of the engineer unless he knew that the action of the conductor brought about a condition of danger, to follow the conductor's orders. This engineer knew that he had been ordered by the conductor to back down on track 8. He knew that his conductor was standing on the rear tender. Under these circumstances there was no duty upon him to make certain that track 8 was clear and

83 the jury were not warranted in finding that he was negligent because he did not see the cars upon track 8.

7. The next contention of the plaintiff is that the head brakeman was negligent. The head brakeman testified that after he had set the brakes on four or five of the fifteen cars which were left on track 10, he climbed through the cars on track 8 and sat down on track 6 expecting the engine to come back on that track. If the head brakeman had known that the deceased was going to undertake to come back on track 8, it may be assumed that it would have been his duty to have done what he could to prevent the accident. But he had no reason to suppose that the deceased would undertake to do that. Under these circumstances he had no duty to perform to prevent the accident, and the jury were not warranted in finding that he was negligent in sitting down on track 6 and waiting for the engine to come back.

8. The last contention of the plaintiff is that the fireman was negligent. This contention is based upon the fact that track 8 was on the fireman's side of the cab and the fireman ought to have seen that there were cars on track 8 when they went through on track 10, and it was negligent for him not to have seen them and to have told the engineer not to go back on track 8. Here again it was no part of the duty of the fireman to examine the tracks to warn the deceased as to which track he ought to take on coming back from track 10. The deceased was the conductor and was in charge of the train subject to the orders of the yardmaster. The jury were not
84 warranted in finding that the fireman was negligent because he did not undertake to superintend the proper execution by the conductor and the yardmaster of their respective duties.

9. The plaintiff has relied upon the fact that the yardmaster made a slip in his direct testimony, in that there is an unfinished sentence in his testimony on cross-examination and upon the fact that on the evidence the jury could find that the deceased was an experienced and careful conductor. In describing on his direct testimony what he did after he had the conversation with the deceased while the deceased was in tower 180, the yardmaster said "he climbed through the cars on 8 and did the same thing to 6; found 6, 8 and 10 were clear." The statement that track 8 was clear, following within nine words the statement that "he climbed through the cars on 8" was so plainly a slip that no inference against the testimony of the witness was justified. The unfinished sentence or cross-examination was this: the counsel for the defendant asked the witness, "That [referring to setting the switch for track 10] would tell the conductor who was approaching that everything was clear, would it not?" To this the yardmaster answered "The conductor could tell by looking at the switches, but as I told him—I don't know as I told him, but I made a hand signal,—the engineer knew everything was all right." From this the plaintiff argues that the jury were warranted in finding that the yardmaster had told the conductor that everything was clear, including in everything track 8. In our opinion the inference is not warranted.

85 The fact that the deceased was an experienced and careful conductor, taken in connection with the fact that on leaving the tower he said that he was going in on track 8 and coming out on track 10, would not warrant the inference that the yardmaster told him to do so.

10. Why the deceased, although an experienced and careful conductor, neglected his duty at the Readville transfer yard four times on the night in question is a matter of conjecture. That he did neglect his duty on that night in four particulars, is the fact. He neglected his duty in not reporting to the yardmaster with his way bills when he had brought his fifteen cars to a stop on track 10 in front of the yardmaster's office; in place of doing that he rode down on the engine to the switch on the end of track 8. He neglected his duty in the second place in undertaking to use track 8 without permission from the yardmaster. In the third place, if he was undertaking to use track 8 without permission from the yardmaster at his own risk, at least he should have examined the track he intended to use without permission to make sure it was clear. And in the fourth place, as the engine was backing down on track 8 he was standing at the rear end of the tender to show a light for the tender, and he stood there until he was killed by coming in collision with the cars on track 8. It is a fact that he had left his thirty cars on the east bound passenger track of the Providence division with a New York fast express only thirty minutes behind him; it is also a fact that he had induced the

86 officer at Midway to make up the train and send him off at three o'clock, when the regular leaving time of the train was forty minutes past four. From these two facts it seems to be likely that the deceased was in a hurry. Whether his hurry explains his neglect of duty and the accident, is a matter of conjecture.

On the evidence the only person who was negligent was the deceased and the judge was right in directing a verdict for the defendant. The case comes within *Great Northern Railway v. Wiles*, 240 U. S. 444. There is nothing in the cases cited by the plaintiff which requires special notice. The entry must be

Judgment on the verdict.

87 [Endorsed:] Gillis vs. N. Y., N. H. & H. R. R. Certified Copy of the Opinion of the Supreme Judicial Court.

Superior Court.

No. 72583.

MARY E. GILLIS, Admx.,

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

Petition for Writ of Error.

And now comes the plaintiff in the above entitled action and respectfully represents that on the third day of July in the year 1916, this Court entered a final judgment in said action in favor of the defendant and against this plaintiff, in which judgment and in the proceedings had prior thereto in this action certain errors appear to the prejudice of this plaintiff, as recited in the annexed assignment of errors.

Wherefore, the plaintiff prays that a writ of error to this Court from the Supreme Court of the United States may issue in her behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this action, duly authenticated, may be sent to the Supreme Court of the United States.

MARY E. GILLIS,

*As She is the Administratrix of the
Estate of Alexander J. Gillis,*

By Her Attorneys,

JAMES J. McCARTHY.

DANIEL M. LYONS.

A Copy.

Attest:

[Seal The Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

91 *Copy of Assignment of Errors.*92 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 72583.

MARY E. GILLIS, Admx., Plaintiff-in-error,

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co., Defendant-in-error.

Assignment of Errors.

The plaintiff-in-error in the above entitled cause in connection with her application for a writ of error from the Supreme Court of the United States to said Superior Court of the Commonwealth of Massachusetts sitting in Suffolk County, makes this the following assignment of errors:

1. The Court erred in ruling as requested by the defendant in error "that upon all the evidence the plaintiff was not entitled to recover."

2. The Court erred in directing a verdict for defendant upon all the evidence as requested by defendant in error.

3. The Court erred in ruling as requested by the defendant in error that upon all the evidence the plaintiff was not entitled to recover under Federal Employers' Liability Act of 1908, 35 U. S. Statutes at Large, 65 C. 149, and Acts in amendment thereof and in directing a verdict for defendant upon all the evidence as requested by defendant in error.

93 4. The Court erred in excluding the following testimony:
"The plaintiff here offered a certified copy of the report made by the defendant to the Industrial Accident Board of Mass., relating to the case, as to the cause of the accident, made by and in behalf of the defendant and signed by its proper officers. The evidence was objected to by the defendant.

Mr. McCarthy: I desire to offer it as an admission by the defendant as to the cause of the accident and the sole cause of the accident and the conditions on track 8.

The Court: You may mark on the report the portions you wish to offer.

Mr. McCarthy: I offer the whole thing. I offer this evidence as tending to contradict the claim made by the defendant that the accident was caused in whole or in part by the contributory negligence of Gillis. I also offer it as tending to prove the damage because of the accident. I also offer it as tending to prove that the defendant admits that there were nothing but flat cars on track 8.

Plaintiff's counsel then designated as the part of the report which he wished to offer in evidence, which reads:

"3. Describe fully how injury occurred. Engine 285 of train M. B. 4 had dropped 15 cars on track 10 Readville transfer yard and was backing through track 8 with conductor Gillis riding on back of engine tank and struck cars on track 8. He was thrown to ground and instantly killed. Cars on 8 were flats and not readily seen."

The Court excluded the testimony and the plaintiff excepted."

94

MARY E. GILLIS,

*As She is the Administratrix of the
Estate of Alexander J. Gillis,*

By Her Attorneys,

JAMES J. McCARTHY.
DANIEL M. LYONS.

Copy.

Attest:

[Seal The Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

95 [Endorsed:] (8) 72583. Suffolk, ss. Superior Court.
No. 72583. Mary E. Gillis, Admx., plaintiff-in-error, vs.
New York, New Haven & Hartford R. R. Co., defendant-in-error.
Assignment of errors. Filed Dec. 23, 1916. Copy. James J.
McCarthy, Daniel M. Lyons, 509-515 Pemberton Building, Boston.
M. E. O. B.

96

Copy of Prayer for Reversal.

97

Supreme Court of the United States.

MARY E. GILLIS, Admx., Plaintiff-in-error,

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co., Defendant-in-error.

Prayer for Reversal.

And now comes the plaintiff in error in the above entitled cause and prays for a reversal of the judgment for the defendant of the Superior Court of the Commonwealth of Massachusetts, entered July 3, 1916.

MARY E. GILLIS, *Admx.,*

By Her Attorneys,

JAMES J. McCARTHY.
DANIEL M. LYONS.

Copy.

Attest:

[Seal The Superior Court.]

FRANCIS A. CAMPBELL,
Clerk of the Superior (Civil) Court.

98 [Endorsed:] (9.) 72583. Supreme Court of the United States. Mary E. Gillis, Admx., Plaintiff-in-error, vs. New York, New Haven & Hartford R. R. Co., Defendant-in-error. Prayer for Reversal. Filed Dec. 23, 1916. Copy. James J. McCarthy, Daniel M. Lyons, 509-515 Pemberton Building, Boston. M. E. O. B.

99 *Original Order Granting Writ of Error.*

100 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 72583.

MARY E. GILLIS, Admx.,

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

Order.

Let the writ of error issue as prayed for, upon plaintiff-in-error giving bond to the New York, New Haven & Hartford R. R. Co., in the sum of Two Hundred Fifty (\$250.00) Dollars conditioned as required by law.

Dated December 23, 1916.

JOHN A. AIKEN,
Chief Justice Superior Court of Massachusetts.

[Endorsed:] (10.) Suffolk, ss. Superior Court. No. 72583. Mary E. Gillis, Admx., vs. New York, New Haven & Hartford R. R. Co. Order granting writ of error. James J. McCarthy, Daniel M. Lyons, Counsellors at Law, 510 Pemberton Bldg., Boston, Mass. Filed Dec. 23, 1916. Superior Clerk's office, Superior Court. Francis A. Campbell, clerk.

101 *Original Citation, with Acceptance of Service.*

102 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to New York, New Haven and Hartford Railroad Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the twenty-second day of January next, pursuant to a Writ of Error filed in the Clerk's Office of the Superior Court of the

Commonwealth of Massachusetts wherein Mary E. Gillis as she is administratrix of the estate of Alexander J. Gillis, deceased, late of Boston, Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court for the Commonwealth of Massachusetts, this twenty-third day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal the Superior Court.]

JOHN A. AIKEN,
*Chief Justice of the Superior Court
of Massachusetts.*

103

Boston, Mass., Dec. 23, 1916.

Due and sufficient service of the within citation is accepted on behalf of the New York, New Haven & Hartford Railroad Co.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD CO.,

By Its Attorney, JOHN L. HALL.

[Endorsed:] (12.) 72583. Citation. Superior Clerk's office, Superior Court. Filed Dec. 23, 1916. Francis A. Campbell, Clerk.

104

Copy of Bond.

105

Bond on Writ of Error.

Know all Men by these Presents, That we, Mary E. Gillis as administratrix of the estate of Alexander J. Gillis, deceased, late of Boston, Massachusetts, and Fidelity and Deposit Company of Maryland, a Maryland corporation, are held and firmly bound unto New York, New Haven and Hartford Railroad Company, a corporation duly established under the laws of Massachusetts, in the full and just sum of two hundred and fifty dollars, to be paid to the said New York, New Haven and Hartford Railroad Company, its successors and assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the twenty-second day of December in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a sitting of the Superior Court of Massachusetts in a suit depending in said Court between the said Mary E. Gillis, Admx., and the said New York, New Haven and Hartford Railroad Company judgment was rendered against the said Mary E.

Gillis, Admx., plaintiff and the said Mary E. Gillis Admx. having procured a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said New York, New Haven and Hartford Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the twenty-second day of January next.

Now, the condition of the above obligation is such, That if the said Mary E. Gillis, Admx., shall prosecute her said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

MARY E. GILLIS, *Admx.* [SEAL.]

FIDELITY & DEPOSIT CO. OF

MARYLAND, [SEAL.]

By A. A. DORITY, *Atty. in Fact.* [SEAL.]

Signed, sealed and delivered in presence of

JAMES J. MCCARTHY.

Approved:

JOHN A. AIKEN,

Chief Justice Superior Court of Massachusetts.

Copy.

Attest:—

[Seal the Superior Court.]

FRANCIS A. CAMPBELL,

Clerk of the Superior (Civil) Court.

106 [Endorsed:] (13.) No. 72583. Bond. Filed December
23rd, 1916. Copy. K. F.

107 *Certificate of Clerk.*

108 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

I, Francis A. Campbell, Clerk of the Superior Court for Civil Business within and for the County of Suffolk, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Mary E. Gillis, as she is the administratrix of the estate of Alexander J. Gillis, deceased, vs. New York, New Haven & Hartford Railroad Company in said Superior Court determined; and attached thereto and transmitted with said Record is the original Writ of Error with return thereon, together with a certified

copy of the Opinion of the Supreme Judicial Court for the Commonwealth, an attest copy of Petition for Writ of Error, an attested copy of Assignment of Errors, an attested copy of the Prayer for Reversal, the original Order Granting Writ of Error, the original Citation with Acceptance of Service and an attested copy of the Bond.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this tenth day of January, in the year of our Lord one thousand nine hundred and seventeen.

[Seal the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

Endorsed on cover: File No. 26225. Massachusetts Superior Court. Term No. 758. Mary E. Gillis, Administratrix of the estate of Alexander J. Gillis, plaintiff in error, vs. New York, New Haven & Hartford Railroad Company. Filed November 10th, 1917. File No. 26225.

Office Supreme Court, U. S.
FILED

MAR 26 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

October Term, 1918.

²⁹⁶
No. 758.

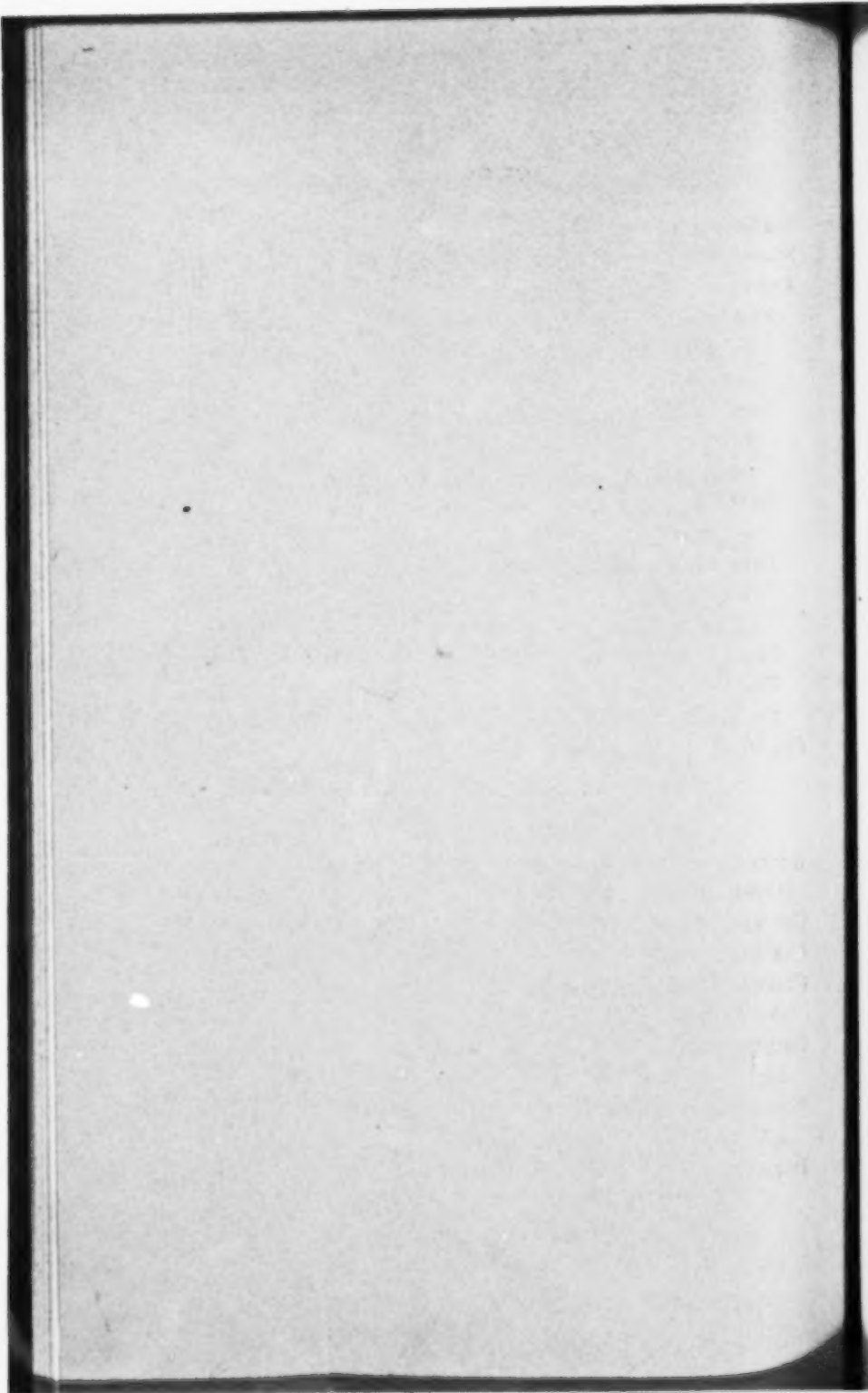
MARY E. GILLIS,
Administratrix,

v.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY.

Brief for Plaintiff in Error.

JAMES J. MCCARTHY,
DANIEL M. LYONS,
THOMAS C. O'BRIEN,
Attorneys for Plaintiff.



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Supreme Court of the United States.

October Term, 1918.

No. 758.

MARY E. GILLIS, ADMINISTRATRIX,

v.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This action is brought under Federal Employers' Liability Act, United States St. 1908, c. 149, as amended by United States St. 1910, c. 143, by the administratrix of the estate of Alexander J. Gillis, to recover pecuniary damages suffered by his death on Sunday, November 3, 1912, while employed by the defendant as a freight conductor, for the benefit of herself, as his surviving widow, and their children.

It is admitted that the case is governed by the provisions of the said Act (41).

Gillis's train left Boston daily at 8.10 p.m., and arrived at Midway, Connecticut, on the following morning, where the train crew would lay off until about 4.40 p.m. of the same day and then return in charge of another train, over the Providence Division to Readville, thence to Boston over the Midland Division (41, 42).

Upon arrival at the Readville yard freight trains

usually would leave main track 2, at a point west of tower 180 (see plan), and proceed up grade over "Freight Main 2" onto the Midland Division, where, if any cars were to be left at the yard, they would be cut off and backed onto "Track 18" (42).

On the day of the accident Gillis's train left Midway at 3.07 p.m., somewhat earlier than usual. On the way back they picked up 15 extra cars at Sharon Heights which were to be cut off and left at Readville (42). Upon its arrival at Readville, the train, because of these 15 extra cars, was unusually heavy, and could not be hauled up the grade over "Freight Main 2." It was accordingly stopped at tower 180 (42).

It was the custom, when cars were to be left at the Readville yards, for the conductors to call up the yard master by 'phone and ascertain from him how they could get into the yard with their cars and out again with their engines (42, 43). This was due to the fact that the yard was a "very, very dangerous" one (29) and a "bad place to take any chances" in (11), where the conditions "are constantly changing all the time," "tracks being filled and vacated" and "cars shifted here, there and everywhere," and because the yard master was apprised of such changes as they were made from time to time and "knew at all times the conditions in the yard" (10).

In accordance with the custom, when the train stopped at tower 180, on main track 2, and the 15 cars at the head end, which were to be left at the yard, were cut off, Gillis entered the tower and talked with the yard master by 'phone (44); he returned in a short time, boarded the engine, alongside of the engineer (44), and then said to him "*we will go in on 8 and out*

on 10" (50). On the way into the yard after leaving tower 180 the engineer, having noticed that the signal was *set for track 10* instead of 8, immediately called it to Gillis's attention, saying, "The switches are lined up for track 10, Al," whereupon Gillis, evidently thinking that the order of entering and leaving the yard was reversed, replied, saying, "It don't make any difference, we will go in through *10 and come back through 8*" (45). The yard master lined up track 10 and was close to 10 switch when the engine and cars went by (29, 16).

Gillis rode into the yard on the brace beam of the tender, between the engine and tender, on the right-hand side of the engine, alongside the engineer (44), by switch 10 and the yard master's office (50), until they stopped on 10, where he cut off the engine, which proceeded to the water plug near the Midland Division bridge and about 100 feet from tower 234. Gillis, having alighted at 8 and 10 switch, joined the engine later at the water plug (45). After the engine had taken water aboard, Gillis gave the engineer a motion to back up, got aboard himself and rode on the rear end of the tender, with his light in his hand as required by defendant's rules (45). The engine backed down track 8 and while Gillis was riding in that position the tender collided with several flat cars which were standing on 8. Gillis was mortally wounded, was thrown from his position, and died within a short time. The force of the collision was so great that one of the flat cars rode "right up over the back of the tender" (46).

The yard master admitted that the flat cars on 8 were "very hard to be seen" (25). That when he talked with Gillis by 'phone he knew that 8 was blocked

with cars and that he didn't warn Gillis against using 8 (38). That it was absolutely necessary that he should tell Gillis what track to come back on with his engine. That it was his business to tell him (18). He claimed that he went to find him and tell him to go out on 6; that when he arrived at the place where he expected to meet him, not finding him there, he waited for Gillis to come to him, and that in consequence he failed to deliver his important instructions to Gillis to go out on track 6 (18).

SPECIFICATION OF ERRORS.

The assignments of error relied upon by the plaintiff are as follows:

1. The Court erred in ruling as requested by the defendant in error "that upon all the evidence the plaintiff was not entitled to recover."

2. The Court erred in directing a verdict for defendant upon all the evidence, as requested by defendant in error.

3. The Court erred in ruling as requested by the defendant in error that upon all the evidence the plaintiff was not entitled to recover under the Federal Employers' Liability Act of 1908, 35 United States Statutes at Large 65, c. 149, and acts in amendment thereof, and in directing a verdict for defendant upon all the evidence, as requested by defendant in error.

ARGUMENT.

The evidence tended to prove negligence of defendant's officers, agents, or employees.

(a) THE YARD MASTER WAS NEGLIGENT BECAUSE HE INSTRUCTED GILLIS TO USE TRACK 8 WHEN HE KNEW IT WAS BLOCKED WITH CARS.

Gillis, a freight conductor for 10 years, was a good man, thoroughly experienced (31); there was none better (42). He was about to make a move in a place (11) which the yard master knew to be a "very, very dangerous" one "to take chances" in, because the tracks were being filled and vacated and cars shifted about "here, there and everywhere," and conditions at any one time might differ from conditions at another time (10). *The yard master admits that a conductor coming into the yard, like Gillis, would not know where to go (10), but that he, the yard master, knew at all times the condition of the tracks in the yard (10), and knew just what track was clear for conductors to come back on and rejoin their train on the main line (30).* He also admitted that *it was absolutely necessary that he should tell Gillis what track he should use in leaving the yard with his engine, and that it was his business to tell him (18).*

More than 26 hours had elapsed since Gillis had passed through Readville on his way to Connecticut, and, being ignorant of the conditions which he would have to meet in going into and out of the yard, he entered the tower, in accordance with the custom of conductors when about to enter the yard, to talk with the yard master by telephone (42), he being the only man who was fully apprised of and knew exactly the conditions which then obtained in the yard (10).

Gillis's state of mind when he left the tower after talking with the yard master (an admitted fact) (11) in regard to the condition of tracks 8 and 10, which he expected to use, is clearly indicated by his statement made to the engineer as he stepped aboard the moving engine at the tower, viz., "*we will go in on 8 and come back through 10*" (50). This was tantamount to saying that 8 and 10 were clear. His state of mind in regard to the condition of track 8 was again revealed a few minutes later when the engineer, having noticed that the signal was set *not for track 8*, but for 10, said to Gillis, "The switches are lined up for 10, Al." Whereupon Gillis, evidently believing that the order of using the tracks was merely reversed, replied, "*It don't make any difference, we will go in through 10 and come back through 8*" (45). Why did he persist in saying that they would use tracks 8 and 10? There were only three tracks in that part of the yard where the move was to be made; they were numbered 6, 8, and 10. Why then did he insist upon using 8 and 10, rather than 6 and 8 or 6 and 10? His action cannot be satisfactorily explained upon the ground of personal preference. The only reasonable explanation is that he would not have done so unless he was assured that 8 and 10 were clear.

It is most significant that Gillis was not disconcerted in the least when told that the switches were lined up for 10 instead of 8. Again his reply to the engineer, "We will come back through 8," warrants the inference that some one told him that track 8 was clear. The only person with whom he had talked about the tracks was the yard master. The only one who knew about the condition of the tracks was the yard master.

The only reasonable explanation of the confidence displayed by Gillis after his talk with the yard master, as evidenced by his conversation with his engineer and by his own movements through the yard, is that he had in fact received information in regard to the condition of tracks 8 and 10. That his statement "*We will go in through 10*" was predicated upon such information is manifest, *for track 10 was in fact clear at the time when he made the statement.* Where and from whom did Gillis get this accurate information in regard to the condition of 10? At the tower, from the yard master, with whom he had been talking and whose business it was to tell him (18). He was the only one who had the information.

It is also significant that when he talked with Gillis the yard master had *two* tracks in mind as he said "he was going to line either 10 or 6" for him (28).

Moreover, it is highly improbable that Gillis, an experienced railroad man, would enter blindly into a maze of tracks without full information which was to be had for the mere asking. That he talked with the yard master about going into and out of the yard and made no inquiry about the tracks which he might use is even more improbable.

The engineer understood from the acts and conduct of Gillis and from what he said to him that track 8 was clear. The conductor usually communicated the orders to him as they proceeded, so that he would know what to expect and how to meet it. "He didn't think there might be cars on 8 that night." He "didn't think that the conductor would attempt to go through track 8 with cars on it" (46). *That the conductor had already told him to go down on 8* (50).

The *only time that the conductor told him to go down on 8* was on the engine immediately after Gillis talked with the yard master (44). It is apparent that the engineer, knowing that Gillis had entered the tower in accordance with the custom (42), to ascertain from the yard master what tracks they should use in entering and leaving the yard, naturally inferred that Gillis's statement that 8 and 10 were clear was based upon information obtained from the yard master at the tower. The conductor's order to go out on 8, which the engineer referred to, was given a few moments later when, after he called Gillis's attention to the fact that 10 was lined up for their entrance, Gillis replied, "It don't make any difference, *we will come back through 8*" (45). The engineer testified that every move made by Gillis from the time when they stopped at tower 180 until the accident was done in the usual way (46).

The engineer spoke in the highest terms of Gillis as a railroad man, saying, "he was a good man," "none better;" that he was steady-going (42). Because of his faith in him *he never for a moment doubted that Gillis had received accurate information from the yard master when he said, "we will come back through 8"* (46).

In the light of these facts it seems plain that the yard master told Gillis that tracks 8 and 10 were clear, and that after he hung up the telephone, realizing that he had made a mistake, he rushed out of his office and threw 10 switch in order to prevent a collision which he knew would be inevitable if the train entered the yard on 8 instead of 10, and then went out to find Gillis and warn him against 8 (18). The jury well might have found that he made such a mistake in view of the fact that in the course of his testimony at the trial he made

a similar mistake when he said that he examined tracks 6, 8, and 10 and found that 8 was clear (12).

Gillis's knowledge of the true condition of track 10 cannot be explained upon any other reasonable hypothesis.

Another significant piece of testimony to the same effect may be found in the cross-examination of the yard master on page 30 of the record, where, after having testified that he threw 10 switch himself, he was asked by Mr. Hall the following question:

“Q. That would tell the conductor who was approaching that everything was clear, would it not?
A. The conductor could tell by looking at the switches, *but as I told him*—I don't know as I told him, but I made a hand signal—the *engineer* knew everything was all right.”

The question called for his opinion of the state of mind of the conductor in regard to whether he knew that “everything was clear.” The words, “*but as I told him*,” plainly indicate that he told the conductor “that everything was clear.” That he realized the full significance of these words is demonstrated by the fact that he instantly checked himself and tried to modify his reply by saying, “I don't know as I told him,” and by attempting to avoid the question altogether, saying, “*the engineer* knew everything was all right.” If he told Gillis everything was clear, he must have meant, and Gillis must have understood, that he referred to the tracks in the only part of the yard which they both understood was available for Gillis to use, viz., 10, 8, and 6, in front of the yard master's office, where he admits he told Gillis he was going (11).

Another fact indicating that the yard master appreciated the full significance of his reply may be found in *his admission that if he had told Gillis to come through 8 he would be held responsible for it* (32).

The yard master claimed that immediately after talking with Gillis on the 'phone, he left his office, carefully examined track 10, climbed through the cars on 8, carefully examined track 6, retraced his steps through the cars on 8, and then walked 320 feet to 10 switch, which he threw, and there waited some few minutes for the train to arrive (12-29). This claim could have been rejected as highly improbable in view of the fact that the few moments which elapsed between the time when he ceased talking with Gillis and the arrival of the train at 10 switch were insufficient for the purpose, especially so in view of the further fact that when he left his office the train had left tower 180 and was already moving toward the yard, and that less than seven minutes elapsed from the time when the train left the tower until it reached the water plug, including the incidental delay in leaving the cars on 10 and cutting off the engine (45).

It is significant that no mention was made of such examination at a later period in the trial, where, in answer to a question put by the Court, he said, "I threw 10 switch; *I left the office long enough to go down there and throw 10 switch*" (39). If he went directly from his office to 10 switch without having made the examination, he would have arrived there somewhat in advance of the train. In view of these facts the jury could have found that the claim was fictitious and that it was advanced in the hope that it would support his denial that he told Gillis anything about 8 and 10.

Whether he told Gillis or not is a question of fact to be viewed in the light of all the evidence and the inferences to be drawn therefrom.

The jury could have found that he did tell him that everything was clear on 8 and 10, or that all of the tracks in front of the yard office were clear, in which event the defendant would be liable.

Nagle v. Boston & Northern, 188 Mass. 38.
Commonwealth v. Trefethen, 157 Mass. 180,
 at 186, *et seq.*

(b) AS ALL YARD WORK PERFORMED BY CONDUCTORS WAS DONE UNDER THE YARD MASTER'S DIRECTIONS (he admitted it) HE WAS RESPONSIBLE FOR EVERY MOVE THAT GILLIS MADE IN THE YARD (33).

The yard master's conduct in this regard should be viewed in the light of his experience and authority, his knowledge of conditions in the yard, his duty to Gillis, his opportunities to warn Gillis, and the means which he had at his command to convey the warning.

He admitted that he had been yard master at Readville for nine years (1), and that *he was in supreme command of the yard where the accident happened*; that he had general charge of the yard, of the freight movements, and of all the men who worked in the yard (7). *That the conductors of all trains, when performing work in the yard, did it under his directions* (33).

The defendant's rules provided that yard masters "will be responsible for the proper distribution and placing of cars in and through the yard limit, and for the prompt movement of cars in and through the yard,

and for the prompt movement of road trains [the kind of train Gillis had] *in and through the yard*" (18).

He admitted that it was his business to see that there were no delays to Gillis while he was in the yard; that it was very important for Gillis to move on as quickly as possible (18). He knew that Gillis's train was left standing on main track 2, right in the path of train 26, one of the fastest on the road, a New York express, and that the rules of the defendant were very rigid in regard to stopping one of those trains (11). *That it was absolutely necessary he should tell Gillis how to get out of the yard; that it was his business to tell him; that he would have told him to come back through track 6, as that would have been the track to use* (18).

The yard master protested at the trial that Gillis should have gone to him with the way-bills and received instructions and the defendant will argue that the accident was caused by his failure to do so. (Whether the way-bills were delivered was never disclosed by defendant.)

Assuming for the moment that Gillis did not get his instructions when he talked with the yard master by 'phone, it should not be forgotten that *these instructions were absolutely necessary to insure his safety* and that of the train crew and the preservation of the property committed to the charge of the yard master.

The important point to be remembered is that Gillis should have been instructed in any event. As to whose duty it was to take the first or last step is of no consequence whatever, in view of the yard master's admissions (18) and the defendant's rule, which reads, "*make the safety of the train of the first importance . . .*" (43).

The yard master had ample time and means to reach Gillis, but instead of doing so he hung around the yard office after he returned from throwing 10 switch for three or four minutes (bottom, 24), until he heard the crash of the collision on 8, within a few hundred feet of the place where he was standing.

That he fully recognized his duty to go to Gillis is evidenced by the fact that he went to the end of the 15 cars on track 10 to find him, although he made no further effort to reach him when he learned that Gillis had gone down to the head end of the train. If, as he claims, Gillis at that time had received no instructions, it was his plain duty to get into communication with Gillis at once and instruct him. *This he could have done by telephoning the men in tower 234 to set the semaphore at danger and thus completely block Gillis's way out of the yard (20), until he received the necessary instructions.* He made no attempt to reach him. He made no attempt to block him, but, on the contrary, he says he watched in order to see that the tower *did not block his way out (20)*, and that if they had blocked him he would have telephoned the tower to give Gillis the signal to go out on 6 (20).

His claim that he was *waiting* for Gillis to come to him for instructions before taking the engine out of the yard is equally untenable, for he admits that while waiting he was also watching the engine to see that it came back on 6 (20). *It is here quite evident that he expected and intended that the engine would leave the yard before he had any further communication with Gillis.*

If the yard master's claims were founded upon fact, he could not escape the charge that he deliberately

neglected to notify Gillis and took a chance on his seeing the flat cars on 8, which he admitted were very hard to be seen (25), in a yard which he said was a "very, very dangerous one" (29), and a bad place to take any chances in (11).

A similar situation was considered in a case where a switchman in a railroad yard was run over while passing from a switch which he had just thrown to another which he intended to throw. The latter had no light upon it and for that reason the plaintiff could not, from where he stood after turning the first switch, determine whether the second switch had been thrown. *It had in fact already been turned by the yard foreman, who did not notify plaintiff of the fact.* SHIRAS, J., in his charge to the jury, said, "As to whether Ryan (yard foreman) was negligent . . . turns upon the question *not as to what the plaintiff was justified in doing and assuming to do, but what Ryan should have foreseen that plaintiff would undertake to do if he was not notified that the switch had been turned.*"

Grant v. N.P. Ry., 45 Fed. 673, 680.

Whether the foreman of a switching crew was negligent in failing to anticipate that a car repairer would return before switching was completed on a track where he had been working, and in failing to warn repairer *was not a question of law but of fact for the jury.*

(Under Federal Act.)

Evans v. Detroit G. H. & M. Ry. Co., 181 Mich. 413.

Flat cars left on track in yard. Dark night. No signal or warning of their presence was given by any one.

An engine backing down collided with the flat cars and plaintiff was injured. Held to be a proper case for jury.

Texas & N.C. Ry. Co. v. Tatman, 10 Tex. Civ. App. 435.

(c) HE HAD EVERY FACILITY AND OPPORTUNITY TO COMMUNICATE WITH GILLIS AND WARN HIM.

He admitted that he knew there were flat cars on 8 when he talked with Gillis on the 'phone at tower 180. After trying to dodge the question and being directed by the Court to answer he admitted that he didn't warn him. When he found Gillis had gone to the head end of the train, *he could have telephoned the men in tower 234 to set the semaphore at danger and thus blocked Gillis's way out of the yard and then megaphone Gillis and tell him to go out on 6.* In the past he himself had used the tower to reach men (23). The megaphone and tower were frequently used for that purpose (bottom, 56).

He admits that if he found the tracks blocked up *he could have telephoned tower 234 and told the men to give Gillis the signal to go down on 6; that they could have pulled the semaphore to safety.* It would then show a green light, "that would have indicated to Gillis that it was safe to proceed down back over 6." "Out over 6" (20). When questioned as to why he did not follow that course, he contradicted himself and denied that he had so testified (20), and tried to excuse himself for not telephoning by saying that the track wasn't blocked. The jury well might refuse to accept his explanation, in view of his contradictory testimony, and have found that if he could have telephoned the tower

men to signal Gillis to go out over 6 when the tracks were blocked, *he could have done the same thing when the tracks were not blocked.*

He admits that *when Gillis was down at the water plug, about 100 feet from tower 234, he could have had the tower men call Gillis to the telephone at the tower and then instruct him to go out on 6 (40).*

To these and other suggestions as to what he might have done to expedite Gillis's movements and insure his safety, he offered various excuses. His examination was full of contradictions and defenses.

The jury had full opportunity, not only to hear but to observe the witness. They could have rejected all of his excuses and explanations of his own misconduct and have found that, though called by the plaintiff, he was a hostile witness and disposed to make his answers as unfavorable as possible and to place all of the blame upon Gillis in order to exculpate himself.

Anthony v. N.Y., N.H. & H. R.R., 208 Mass.
11-14.

(d) IF GILLIS HAD BEEN WARNED AGAINST TRACK 8 AT THE TELEPHONE CONVERSATION, THERE WOULD HAVE BEEN NO NECESSITY FOR FURTHER COMMUNICATION BETWEEN HIM AND THE YARD MASTER. IF THE MOVEMENT WAS MADE IN THE MANNER DESCRIBED BY THE YARD MASTER, IT WAS A PIECE OF BAD RAILROADING ON HIS PART.

At the time when Gillis informed the yard master that he could not haul his train up the grade, the usual way, over freight main 2, they both realized that the only part of the yard where he could make the move was in front of the yard master's office.

The yard master knew, but *Gillis did not*, that one of these tracks, to wit, 8, was blocked with cars.

If the yard master had warned Gillis against 8, or told him it was blocked, and then lined up 10 for him, Gillis at once would have realized that 6 was clear. There were but three tracks in that part of the yard, 10, 8, and 6.

In other words, if Gillis was informed that 8 was blocked, he would infer from the fact that he was permitted to enter on 10 that the only other available track, viz., 6, was clear for him to go out on. As a railroad man he would know that he would not be allowed to enter on one track unless there was a clear way out on the remaining track.

Had this course been followed it would have obviated the necessity of further instructions on the part of the yard master. He would not have to search for Gillis to instruct him as to what track to use in going out, nor would Gillis have to go to him for instructions. He wouldn't need any.

Here again the jury might have found that the course claimed to have been followed by the yard master was hastily adopted in an attempt to correct his own fatal mistake, and that it was a piece of poor railroading and never should have been adopted.

Whether plaintiff needed warning and also whether a superintendent, who had better means of observation and of seasonably appreciating the danger, should have warned the plaintiff before it was too late are questions for the jury.

Dooley v. Sullivan, 218 Mass. 597.

Proulx v. J. W. Bishop Co., 204 Mass. 130.

Sullane v. Kellogg, 169 Mass. 544, 550.

Dunphy v. Boston L., 192 Mass. 415, 416.
Shea v. N.Y., N.H. & H., 173 Mass. 177.
Donahoe v. O.C. R.R., 153 Mass. 356.
Louisville & N. R.R. v. Johnson, Adm., 161
 Ky. 824.
Ill. Central R.R. v. Skaggs, 240 U.S. 66.

THE ENGINEER WAS NEGLIGENT.

If the defendant contends that Gillis got no instructions from the yard master to go out on any track, or that he was not told any of the tracks were clear, and that he was to blame for attempting to go out without instructions, *the engineer* was equally culpable under the defendant's rules, which provide that the engine-men shall "make the safety of the train of the first importance in the discharge of their duties" (43). (A train is an engine with or without ears (35).

The rules also provide that *enginemen* shall "consult with the conductor and be equally responsible with him for the safety and proper handling of the train," and to "be vigilant and cautious not trusting alone to signals or rules for safety" (43). Under rule 500 engine-men are directed not to obey the orders of conductors if such orders endanger the safety of the trains . . . or cause injury to persons or property (51).

The engineer admitted that it was his duty as much as the conductor's to see that his engine got out safely (48).

He admitted that when they were backing out on 8 his head and body were thrust out of the cab window (45); that *he* was looking out over track 8 to see if it was clear (48).

He admitted that if a man had looked properly in the

direction in which he was looking *he ought to have seen obstructions on the track* if any were there (49). If he looked, he looked negligently.

Fitzgerald v. Boston L., 194 Mass. 242.

Willis v. B. & N., 202 Mass. 463.

Cokinos v. Boston L., 209 Mass. 225.

If, as the defendant claims, the conductor was negligent, it would in all fairness seem that the engineer was equally negligent under the rules and upon the admission of the engineer that he was equally responsible with the conductor for the safety of the train. The plaintiff in that event would be entitled to recover under the Act for the death which resulted in part from the negligence of the engineer who was an employee of the defendant.

THE HEAD-END BRAKEMAN, GALLAGHER, WAS NEGLIGENT.

He was the man whom the yard master found at the end of the 15 cars on 10 when he went there, as he claimed, to find and instruct Gillis.

He testified (54) that after he finished his work on 10 he walked round the cars on track 8 and proceeded until he came to track 6. He continued, saying: "When I got down onto 6 after rounding the cars there on 10 or 8, and sat down on track 6 and waited for them to come, the engine was then way down to the plug.

"Q. You could see it, nothing to interfere with your view, was there?

"A. No, sir.

"Q. Did you see it as it backed from the plug on 8?

"A. Yes, sir.

"Q. Did you have a lantern with you?

"A. Yes, sir.

"Q. Did you use it?

"A. Well, I didn't use it then, no.

"Q. You knew at that time that there were cars on 8, didn't you?

"A. Yes, sir.

"Q. Because you had walked around them?

"A. Yes, sir.

"Q. You saw the engine as it came in on 8?

"A. Yes, sir.

"Q. You didn't make any attempt to signal the engine, did you?

"A. No, sir.

"Q. Or to stop it from coming in on 8?

"A. No, sir.

"Q. Although you had a lantern in your hand?

"A. Yes, sir."

He also testified that he was less than one minute distant from the place where the accident occurred (55), when he saw the engine as it backed down from the plug (54).

Under the Act this presents a plain case of negligence of a fellow-servant for which the defendant may be held responsible.

THE FIREMAN WAS NEGLIGENT.

If, as the yard master claims, the cars on 8 were so close to track 10 that you could touch them from 10 (39), the fireman was negligent in not seeing the cars on 8. He was in the fireman's seat, looking out all the

way down track 10 as they pulled into the yard, and he didn't notice the cars on 8 (56).

As Gillis rode into the yard from tower 180 on the engine alongside the engineer the fireman doubtless heard the conversation between him and the engineer in regard to going out on 8.

If the cars were as close as the yard master claimed they were, the fireman could have touched them from his seat and he should have seen them and warned the engineer against executing Gillis's order to go out on 8.

If he looked at all he looked negligently.

Proof of dependency and pecuniary loss.

The plaintiff also offered evidence tending to prove that the deceased left a widow and several minor children surviving him, who, at the time of his death, were dependent upon him. She also offered evidence tending to prove that the said widow and children had been deprived of a reasonable expectation of pecuniary benefits by the death of the said Gillis and the amount of the actual financial loss thus sustained by them (58).

Mich. Cent. R.R. v. Ireland, 227 U.S. 59, 68, 70.

It is submitted that the decision of the Supreme Court of Massachusetts is not based upon the construction of the testimony in the light most favorable to the plaintiff. The contrary, however, would seem to have been the rule adopted.

The opinion shows that wherever the yard master, whose conduct was under investigation, offered an explanation of his acts or failure to act, his explanation was adopted. The negligence of the defendant was

measured, in part at least, by the yard master's own standard; established through his own testimony. "Good railroading," from the standpoint of the yard master, was another test adopted by the Court, to dispose of plaintiff's contentions as a matter of law. A typical instance of this will be found at the bottom of page 66 of the record, where, in answer to plaintiff's contention that the yard master ought to have warned the deceased that there were cars on track 8, when he first spoke to him over the telephone while deceased was in tower 180, the Court says, "But that would have been bad railroading, *as the yard master testified.*"

It is submitted that whether an act is good or bad railroading is not the province of the yard master to decide; it is plainly a question for the jury.

Another instance where the Court rejects the view distinctly favorable to the plaintiff and adopts the view favorable to the defendant may be found on pages 54 and 55 of the record, where the brakeman explained his failure to swing his lantern and stop the engine from backing down on 8, where he knew there were cars, by saying that he didn't know where they were going to back down. This explanation was adopted, in spite of the admission by the witness that he saw them backing down on 8 from the moment the engine entered the switch until the collision occurred 250 feet from the switch (66, 68).

CONSTRUCTION OF THE ACT.

It was the intention of Congress, in the enactment of this law, to shift the burden of the loss resulting from casualties sustained by interstate employees from those least able to bear it, and place it upon those who

can, as the Supreme Court has stated in the *Taylor* case, 211 U.S. 281, measurably control their causes.

“The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change as far as Congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as ‘unjust!’”

Report of Senate Judiciary Committee on Amendments of 1910 to Federal Employers’ Liability Act of 1908.

Roberts on Injuries to Intestate Employees, 349-350 (1st ed.).

In *Chicago, R.I. & P. Ry. Co. v. Brown*, 185 Fed. 80, the Court said:

“To our minds the act was intended, not to increase the difficulties of getting compensation for injuries sustained, but to decrease the number of cases in which injuries would happen.

The following cases show with what liberality the Act has been construed:

Where train stopped at night on a trestle bridge with *floor on one side of track but not on the other*, a train porter upon the command of the conductor, who knew the condition of the trestle, stepped from the train on the side that was not floored, fell several feet to the ground, and was injured. He had been ordered by the conductor to get off the train and carry an oil can to the engineer. Held: That the conductor, as agent of

the defendant, was negligent in *failing to inform the porter as to the proper side of the bridge for him to alight on.*

Mo. K. & T. Ry. Co. v. Bunkley, 153 S.W. 937.

Where a foreman took no precaution to protect workmen upon a railroad bridge by sending out flagman.

Norfolk & W.R. Co. v. Holbrook, 215 Fed. 687; S.C. 235 U.S. 625, reversed on question of damages.

Failure to light and guard a hole in a platform presents a question for the jury.

Copper River N.W. Ry. Co. v. Henney (C.C.A.), 211 Fed. 459.

An employee riding on side of box car at night, struck a switch stand and was injured. Defendant's negligence was for the jury.

McDonald v. Ry. T. Co., 121 Minn. 273.

A switchman working on a track in the terminal yard at night was struck and killed by engine with dim headlight moving slowly and almost noiselessly in same direction. A train on nearby track was passing, making considerable noise. The engine could have been stopped within a few feet, but engineer did not see switchman. A verdict for plaintiff was affirmed.

Southern Ry. Co. v. Smith, 123 C.C.A. 488.

A car foreman had exclusive possession of keys which unlocked switches of a repair track in yard. Car

repairer, while working on the track, ordered by foreman to go to another track and make slight repairs to a car. While he was absent, foreman ordered switching crew to take out some cars and push others in on repair track. Having no knowledge of foreman's order or that cars were being switched onto the repair track, the car repairer returned, and while at work on a car standing on the repair track it was struck by other cars shoved against it by switching crew, causing his death. Held: *That whether the foreman was negligent in failing to anticipate that the car repairer would return before the switching was completed and in failing to warn decedent was not a question of law but a question of fact to be solved by the jury.*

Evans v. Detroit G. H. & M. Ry. Co., 181 Mich. 413.

A car inspector was run over and killed at night in terminal yards by cars backed up by switching engine without warning, without light, and no one on end of car to warn him of danger.

Thornton v. Seaboard A. L. Ry. Co., 82 S.E. 433.

The plaintiff with two other men, one a yard master, while repairing a switch in yard of defendant, was struck by four empty cars kicked down the track. Yard master killed and plaintiff injured. No warning was given of the approach of the cars.

The plaintiff relied in part upon the failure of the defendant to give instructions to guard the men by having some one detailed to watch for cars and protect them. Upon this point the Court said that where a

gang of men is working on a track in the dark and where trains are being constantly operated, as in the case at bar, it is a *fair question for the jury whether the railroad company should give such instructions*. That at least it is a fair question of fact whether a railroad should have a rule instructing its employees always to maintain a watch while at work in the dark.

Colasurdo v. The Central R.R. of New Jersey, 180 Fed. 832; S.C. 192 Fed. 901 (C.C.A.).

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Attorneys for Plaintiff.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 758.

MARY E. GILLIS, ADMINISTRATRIX OF THE
ESTATE OF ALEXANDER J. GILLIS,
PLAINTIFF IN ERROR,

v.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF
MASSACHUSETTS.

BRIEF FOR THE DEFENDANT, NEW YORK, NEW
HAVEN & HARTFORD RAILROAD COMPANY.

STATEMENT OF FACTS.

This is an action of tort brought by the plaintiff under the provisions of the Federal Employers Liability Act to recover for the death of her husband, Alexander J. Gillis, who was injured while in the employ of the defendant at the Readville freight yard upon November 3, 1912.

Gillis, an experienced conductor, was in charge of a night freight train running between Midway, Connecticut, through Providence, Attleboro, Mansfield and Readville to South Boston. Ordinarily, this train would leave Midway at 4.40 P. M., but on the day of the accident, which was Sunday, they got out a little earlier, having started

at 3.07 P.M. (Rec. p. 42.) That meant that they would get into Boston about 11 o'clock that night instead of 2.30 on Monday morning.

When the train reached tower 180, just west of the Readville transfer yard, Gillis stopped the train and went to the tower; there he telephoned White, the yard master of the Readville yard, saying: "I have a heavy train, 15 cars, and I don't think the engine can handle them over the hill. I would like to pull up into the yard. I have obtained permission from the Providence Division dispatcher to leave my train on the main, if you will give me permission to pull into the yard." In response to that White said: "All right, Al, I will line up one of the clear tracks in front of the office to pull down and drop your 15 cars." No further direction was given to Gillis. Gillis returned to the engine, telling the engineer that they would pull in on track 8 and come out on track 10. The 15 cars were left on the main track and the engine approached the transfer yard with Gillis riding on the engine. As they approached the switch which controlled track 8, the engineer called Gillis' attention to the fact that the switch was set for track 10, whereupon Gillis replied: "It won't make any difference; we will go in through 10 and come back through 8." There were three tracks in front of the office, numbered 10, 8 and 6. No directions had been given by White or by anyone else to Gillis as to the particular track on which he should enter or by which his engine should return to his train. After White had told Gillis that he would line up one of the clear tracks in front of the office, White left the office and inspected 6, 8 and 10. He found that 8 was blocked with the 18 cars which pretty well filled up the track, but that 6 and 10 were clear. He then lined up track 10 for Gillis to enter the transfer yard. By "lining up" is meant throwing of the switches and the setting of the sig-

nals so that there was a clear track for Gillis to enter the yard and leave his 15 cars.

The train then proceeded on 10, went up on that track, where it stopped at a point west of the 10 signal; Gillis then left the engine and got down to make the cut between the head car and the engine. He was then on the ground and the engine moved over switches 8 and 10. Gillis threw the switch for 8 and the engine then proceeded to the water plug. Without getting any instructions whatever as to what track he should leave the transfer yard and rejoin his cars on the main line, Gillis gave the signal for the engine to come back on 8 and took a position on the tender of the engine which was moving backward on track 8. The night was dark and apparently Gillis did not see the cars that were on track 8 and while motioning the engine back on that track a collision occurred, which resulted in his death.

No fair consideration of the facts in this case can be gained until the arrangements of the tracks, switches, towers and other physical objects is understood.

The Readville yard, so-called, consists of six yards so located that cars may be transferred from various trains to other trains destined to all points on the New Haven system. Freight cars are continually being set off and picked up there. The yard with which we are concerned is known as the transfer yard. Its location is described on the plan Exhibit 1.

Directing attention to Exhibit 1 and beginning at the south at Sprague Brook, there are three tracks; the two westerly tracks are main line tracks between Providence and Boston, numbered 1 and 2; the third or easterly track is track No. 6 and is known as a ladder track, branches from it extending into the freight yard, and at a distance of about 250 feet from Sprague Brook is tower 180, which controls interlocking at that point and to the

south. At tower 180 cross-over tracks are laid so that trains may enter from the main tracks 1 and 2 to tracks which are described upon the plan as "freight main No. 2", "freight main No. 1" and "track No. 6". From track No. 6 or the ladder track, which extends to the north a distance of 3,840 feet to what is described as "6 switch", trains may be switched on to tracks 8, 10, 12, 14, 16, 18, 20, 22, 24, 26 and 28.

At a distance of about 2,600 feet north of tower 180 the yard master's office is located between track No. 10 and track No. 12. Tracks 14 to 28 and freight main No. 2 and freight main No. 1 are on an ascending grade beginning at a point about 1,400 feet north of tower 180. The grade is such that it is difficult for engines to haul heavy trains. Tracks west of the yard master's office, 6, 8 and 10, are substantially level. The small lines that are at right angles with track No. 6 spaced about $2\frac{1}{2}$ inches apart indicate the location of hand switches leading off of track 6. At a point about 350 feet south of the yard master's office is located a switch, which permits trains to leave track 6 for track 10. At the northerly end of track No. 10 a distance of about 800 feet north of the yard master's office is a switch which controls tracks 8 and 10 at that end of the yard and at about 120 feet further north is No. 6 switch. Between tracks No. 4 and No. 6 and south of 6 switch is located a semaphore signal and in that immediate vicinity is a water plug.

At a distance of nearly 4,000 feet north of tower 180 is another tower numbered 234, which controls the interlocking switch and semaphore signals.

The tracks which have been described are included within what is known as the Providence Division of the defendant. Near tower 234 the tracks of the Midland Division cross the tracks of the Providence Division in an easterly and westerly direction by an overhead bridge.

Tracks numbered 3, 1, 2 and 4 are main tracks running through to Boston. Tracks described upon the plan as "main freight transfer track No. 2 and No. 1" are tracks which lead straight through to the South Boston Freight Terminal of the defendant.

The regular route for freight trains destined to Boston is over freight main No. 2. (Rec. p. 9.) If a conductor wished to come into the yard and come up any other track besides one of the freight mains, he would first ask permission from the yard master either at tower 180 or "down the line", or a conductor might take the regular route "up over the hill to the other tower and ask permission in that end of the yard as to which track he could set them off on". That is, the practice was that a conductor might come into the yard and use *freight main No. 2*, go up by the yard master's shanty and get into communication with the yard master over the telephone, or, if he had a long train his buggy would be down about opposite the yard master's office; he could jump off and go across to the office. If a conductor feels that he ought to take a route other than the regular route for all freight trains, that is, if he "thought the train could not be hauled up over the hill or something of that sort or he ought to make a yard movement, he asks permission of the yard master". The conductor can go into the yard with the train because that is on the level. If a conductor had a heavy train and had cars to leave at the Readville yard, he could under proper instructions leave a part of his train on the main line instead of going up over the hill, pull into the yard with the cars that were to be left at Readville, and then rejoin his train that he had left on the main line. Under the circumstances of that movement, it was the practice of the conductors to learn from the yard master just what track was clear for him to go back

on and rejoin the train on the main line. Those instructions are given to the conductors alone. (Rec. p. 30.)

Walter A. White, a railroad man of seventeen years' experience, was the yard master and his office was the main headquarters of the six branches of the Readville yard; he had general supervision of all the yard work and kept an eye over the passenger station and over the towers. He saw that cars were set off on the proper tracks, that proper cars went on the proper trains, that perishable freight was removed; he saw that there were no unnecessary delays to occur to road trains and that the towers were giving all proper movements. On nights other than Sundays he has a clerk who takes a check of all cars. On Sunday nights White is there alone. The car bills which accompany every car are surrendered by the conductor when he comes to the yard to the yard master; these bills are put up in the rack. (Rec. p. 28.) His yard was a transfer point; he kept the bills until the cars moved; when the cars moved the bills were turned over to the conductor. When the conductor comes in to take out the cars, he goes to the yard master's office and the tonnage of his train is ascertained. The yard master takes down whatever bills are necessary to fill out, figures up the cars and figures up the tonnage. The yard master informs the conductor at the office on what track his cars are located, and if he has cars to set off, on what track he is to place them. When a conductor came into the yard he would obtain permission from the yard master before entering and after entering would present his bills and take his instructions from the yard master, learning what track was clear for him to go back on and rejoin his train.

White, the yard master, came to work at 7 o'clock that evening and as soon as he conveniently could he looked the yard over to see what he had; that might take fifteen minutes to half an hour. After that time and before the

accident trains probably set off and picked up cars in the yard. Except that an engine or two might have gone down over 6 or 10 to take water somewhere around 9 o'clock or 10 o'clock, there was no movement of engines or cars on tracks 6, 8 or 10. (Rec. p. 12.)

Tracks 12 to 20 were used by trains picking up cars; they picked up or left in that group of tracks numbered from 16 or 18 before the accident. (Rec. p. 15.) The last train that did any work left there about an hour before the accident.

Gillis at about 10:15 approached tower 180 with 45 cars. He had obtained permission from the train dispatcher at Providence, who controls the iron up to tower 180, to drop his train on the main line provided the yard master would permit him to pull into the yard. (Rec. p. 11.) Gillis went to the tower and telephoned White, telling him that he had a heavy train and that he didn't think his engine could haul them over the hill. (Rec. p. 11.) At that time train 26, which was a New York express, was due in 29 minutes. In response to Gillis' request, White told him that it would be all right and that he would line up one of the clear tracks in front of the office. White did not give him the number of any particular track upon which Gillis was to enter or to return; then in order to be sure that conditions were right for this move that was out the ordinary (Rec. p. 13), White went out of the yard office and found that there were no cars upon track 6; that there were cars upon 8 and that track 10 was clear. (Rec. p. 29.) He then walked down to switch No. 10, which was about 320 feet from the office, and threw the switch which would let Gillis' train in on 10. The other switches were set and the signals showed to the engineer that track 10 was set for him to enter. (Rec. p. 29.) Shortly afterwards, the engine approached and White gave the engineer the hand signal to "come on". The engine and

some of the cars passed by White and he noticed a man on the engine with a white light. He did not know then that that was Gillis. The middle of Gillis' train, consisting of 15 cars, stopped about opposite the yard master's office. (Rec. p. 54.) White then walked down toward the rear end of the 15 cars to "find the conductor, get his bills and do the business with him—give him his instructions; I mean the bills of the 15 cars which he was going to leave with me; these cars were to be distributed by me at Readville to these various points within that zone." (Rec. p. 30.)

It was the conductor's duty to report to the yard master as soon as he can after running in the yard, give the yard master the bills and receive the instructions.

When White went toward the rear of the train and found that the conductor was not there, he went back so as to be handy to the yard office. (Rec. p. 30.) He went there so that he could answer any telephone or get in touch with the tower in case there was a block. It might also be necessary for some other yard to get into communication with him at that time. It was his duty to stay pretty close to the yard office because he was working alone at that time.

While White was lining up the track and giving the engineer the signal and waiting for Gillis to come to him with his bills and to receive instructions, Gillis had gone back to the engine and had told the engineer that "we will pull in on track 8". (Rec. p. 44.) The engineer then proceeded on the way from tower 180 into the yard, and he saw that the switches were lined up for track 10. He said to the conductor, who was on the engine with him: "The switches are lined up for track 10, Al." Gillis replied: "It won't make any difference; we will go in through 10 and come back through 8."

The train then moved over switch 10, and the engine

passed by the yard master's office and stopped on track 10. Gillis got off the engine and made the cut between the engine and the head car of the string of 15 cars, got on again and rode down as far as 8 and 10 switch, where he got off. (Rec. p. 45.) The engine proceeded to the water plug, which is located about 100 feet from tower 234. (Rec. p. 45.) Gillis threw the switch which permitted the engine to back on to track 8, and the signal was set for the engineer to come back on 8. (Rec. p. 52.) Gillis then came down to the water plug where they were taking water. (Rec. p. 45.) After they had gotten the water, Gillis gave a motion to the engineer to back up. At that time he was alongside of the cab. The engineer said to Gillis: "There is no light on the rear end of the tender." The rules required a light backing through the yard at night time. (Rec. p. 45.) Gillis then got on to the rear end of the tender and stood there while the engine backed up. Gillis gave the engineer the motion to back up, and the engineer put his head out of the window in order to see. He was watching Gillis because he was under the conductor's orders, so far as the movements in the yard were concerned. The conductor had his lantern in hand, and when he wished the train slowed down he held the lantern outside the cab. The engineer was watching Gillis to see if any signal was given. Nothing happened until they came into collision with the cars that were on track 8 at a point about 250 feet south of No. 8 and 10 switch. There were 18 cars on track 8; 6 or 7 of them were freight cars. (Rec. p. 25.)

Gillis had received no instructions from White or from anyone else that he was to return to his train by track 8. Apparently he had made no inquiry or examination to ascertain whether or not track 8 was clear. It was his duty to ascertain this fact before he motioned the engineer to come back on track 8.

No question was raised that Gillis was engaged in interstate commerce and that the case is governed by the Federal Employers Liability Act.

POINTS AND AUTHORITIES.

I.

Plaintiff Not Entitled to Writ of Error.

There is no final judgment in which there is drawn in question the validity of a statute of or authority exercised under the United States and the decision against its validity. Nor is there any title, right, privilege or immunity claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States where the decision is against the title, right, privilege or immunity especially set up or claimed by the plaintiff under such constitution, treaty, statute, commission or authority.

It was admitted that the case was governed by the Federal Employers Liability Act and full force and effect were given to that statute by the courts of Massachusetts.

Moreover, at the close of the evidence in this case the court directed a verdict for the defendant subject to the objection and exception of the plaintiff, *with the stipulation of the parties that the case was to be reported for the determination of the full court, with the further stipulation that if the ruling and direction were right, then judgment was to be entered for the defendant, and if the case should have been submitted to the jury then judgment was to be entered for the plaintiff in the sum of forty-five hundred dollars.* (Rec. p. 58.)

It is a frequent and convenient practice in Massachusetts for the presiding judge after ruling upon a fundamental question and after a verdict has been found to report the question of law to the Supreme Court. (Revised Laws, Chap. 173, Sec. 105.)

"A justice of the Supreme Judicial Court or of the Superior Court after verdict or after a finding of the facts by the Court and a majority of the justices of the Superior Court sitting for the trial of the cause . . . may report the case for the determination of the full court."

It is also the practice for the presiding judge to report a question with the stipulations agreed to by the parties that if the ruling was wrong a verdict in favor of one party might be set aside and judgment entered for the other party in an agreed amount. *Without the consent of the parties, however, no such stipulation can be made.*

Smith v. Lincoln, 198 Mass. 388.

II.

Decision of Massachusetts Court Governs.

In determining whether the injury of the plaintiff's intestate resulted in whole or in part from the negligence of any of the officers, agents or employees of the defendant, the decisions of the United States courts and the courts of Massachusetts are in harmony and do not conflict.

The decision of the Supreme Judicial Court of Massachusetts controls upon the facts of this case.

In the absence of manifest error this Court will not disturb the findings of State trials and appellate courts as to insufficiency of evidence concerning negligence.

Baltimore & Ohio R. R. v. Whitacre, 242 U.S. 169.
Eric R. R. v. Welch, 242 U.S. 303.

The question in this case does not involve the interpretation of any act of Congress, but turns simply upon the determination of whether there was a question of fact to be submitted to the jury as to the existence of negligence. Both the trial and appellate courts of the Common-

wealth of Massachusetts have held that there was no issue for the jury.

There is no manifest error in such finding that would warrant this Court in saying that the jurisdiction of the courts of Massachusetts had not been properly exercised. The decision ought not to be disturbed.

III.

There is No Evidence that the Death of the Plaintiff's Intestate Resulted from the Negligence of any of the Officers, Agents or Employees of the Defendant, or by Reason of any Defect or Insufficiency due to its Negligence in its Cars, Engines, Appliances, Machinery, Track, Roadbed or other Equipment.

The first section of the Federal Employers Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, as amended April 5, 1910, Chapter 143, 36 Stat. 291, provides that every common carrier by railroad while engaging in interstate commerce and while the servant injured or killed is employed in such commerce is liable "for such injury or death resulting in whole or in part from the negligence of any of of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipments".

There is no claim in this case that there is any liability arising out of the negligence of the defendant in respect to its rolling stock, machinery, track or other equipment. The claim is confined to the negligence of some officer, agent or employee of the defendant.

If the cause of an employee's injury or death is his own negligent act, there can be no recovery under the Federal Act.

Grand Trunk Ry. v. Lindsay, 233 U. S. 42.

The injuries received by Gillis were not due to the negligence of any officer, agent or employee of the defendant, but were due solely to his own act. He was a conductor of ten years' experience. He was familiar with his work and apparently familiar with the rules. He had never worked on any division other than this Providence Division, and his service was entirely in the freight department. He had been in the Readville yard numerous times. (Rec. p. 31.) *He was in charge of that train.* (Rec. pp. 31, 37.)

Rule 615 provides: "CONDUCTORS. Be responsible for all switching movements; leave all cars on sidings in perfectly safe order, hand brakes set and derail switches open, and full clearance given to main tracks."

Rule 103 provides: "CONDUCTORS. Conductors will be held responsible for the proper position of the switches used by them and their train men, except where switch tenders are stationed." There was no switch tender stationed at track 8 or 10. (Rec. p. 51.)

The engineer was under Gillis' orders so far as the movements in the yard were concerned. (Rec. p. 52.) The rules required that Gillis should learn from the yard master whether or not track 8 was clear. (Rec. p. 33.) It was Gillis' duty to deliver the bills accompanying his cars to the yard master, as well as to receive instructions from him as to the track by which he should leave the yard. Gillis did neither of these things. When he passed by the yard master's office, there were 18 cars upon track 8 which he could almost have touched. Gillis could have telephoned the yard master from tower 234 and in that way ascertained by what track he could go out. Gillis could have gotten down and sighted track 8 after he had thrown the switch at 8 and 10 while he was waiting for the engine to take water. The night was clear and if Gillis had gotten down and sighted along the tracks he

could have told whether there were cars on 6 or 8. The cars would have obscured the light on the other end and that would have told him of an obstruction on the track. (Rec. p. 47.)

Gillis had been in the habit of coming into the yard for a number of years, leaving his cars in that part of the yard, pulling back and joining his train on to the main line. Previously he had always come to the yard master for instructions as to what track he would pull back on. (Rec. pp. 33, 34.) Instead, Gillis took a chance and did these things himself without getting any instructions for his safety or the safety of the men with him. (Rec. pp. 33, 37.)

During the trial of the case every effort was made by the plaintiff to fix the responsibility of Gillis' death upon White, the yard master. It is to be borne in mind that all of the testimony comes from the plaintiff's witnesses; two of them were still in the defendant's employ. This Court is respectfully invited to examine carefully the somewhat lengthy record in order to ascertain the existence of any bias shown by the witnesses still employed by the defendant against their former fellow employee. It is submitted that nowhere does such bias exist and the long cross-examinations has shown no effort on the part of these witnesses to escape the consequences of the real facts.

When Gillis made his request for this movement that was out of the ordinary from the regular route (Rec. p. 34) he was told by White that he would "line up one of the clear tracks in front of the office". White testified to this (Rec. p. 11) and his testimony is not disputed nor is it contradicted by any legitimate inference of fact.

In the effort of the plaintiff to fix blame upon White, it is sought in the first place to show that White said something else; that he must have said "come in through 10

and go back through 8" because those were the words that were used by Gillis when he returned to the engine at tower 180. Bartlett testified (Rec. p. 44) that Gillis said to him: "We will pull in on track 8." Later Gillis said: "We will go in on 8 and come out on 10." (Rec. p. 50.) It does not appear that Gillis told Bartlett that White told him to pull in on track 8 or to come out on track 10; that was plainly a conclusion on the part of Gillis when White told him that he would line up one of the clear tracks in front of the office. The tracks in front of the office were 6, 8, 10, and Gillis was familiar with their location. (Rec. p. 33.) Moreover, Gillis was wrong in his conclusion because when the engine approached 8 and 10 tracks the engineer noticed that the switches and signals were lined up for track 10. Gillis was also wrong in his conclusion because at that time track 8 was blocked with 18 cars.

The plaintiff further insists that inasmuch as White in the performance of his duty had looked over the yard earlier in the evening he must have known that track 8 was blocked and that he could perfectly well tell Gillis that he could come in on 10 and go out on 6, but that White made a mistake and instead of saying track 6 said track 8.

There is absolutely no foundation for such a claim.

It is true that White looked over the yard shortly after coming to work. This was his practice and his duty. He says that he probably did learn at that time that track 8 was blocked because there had been only engine movements on tracks 6 and 10 between the time he first looked over the yard and the time that he talked with Gillis. But the movement requested by Gillis was out of the ordinary; the regular route for freight trains would be up over track 2 and when this movement was to be made White wanted to be absolutely sure that the tracks were

right and that the conditions were right. (Rec. pp. 28, 29.) He went out himself and looked at track 10, climbed through the cars at 8 and took a look at 6. (Rec. p. 29.) There had been movements made that evening on some of the tracks numbered from 12 to 28. Cars had either been picked up or left there during the evening. Those tracks are on a hill, and some mistake might have been made during the evening before Gillis arrived. Sometimes cars on those yard tracks get away and come down the grade and they might have blocked either 10, 8 or 6. White made this examination to see that no cars had come down, through accident or otherwise, on to these tracks, 6, 8 and 10, in front of his office from the hillside or from some other part of the yard, or to be sure that no one had made a "bull".

"Q. Well, who was there that night to make a bull except yourself?

A. Why, those trains that set off cars there the first part of the night, that I have mentioned.

Q. Did they set off cars there the first part of the night?

A. I said I did not recollect whether they did or not, but they might have; they might have set them off." (Rec. p. 13.)

He made his examination and he found everything all right. It was his duty to have made this examination and no inference should be drawn against his conduct in assuring himself that it was safe for Gillis to come ahead. An effort was made to show that it was the practice of trains to stop at tower 180 before entering the yard, and that it was the practice for the conductor to go to the tower to find out where cars should be placed in the yard. In this connection attention is called to the direct

examination of the witness Bartlett, the engineer (Rec. p. 42):

"Q. Pardon me just a minute. You say you would find out how to get in or to get out by communication with the yard master? A. Yes, sir.

Q. That was the custom? A. Yes, sir.

Q. He might do that sometimes, from Mansfield? A. Yes, sir.

Q. So that when he got down here to the Readville yard, he would know where he was going in, how he was going in, and how he was going out? A. Yes, sir.

Mr. HALL: Well, now, just a minute.

The WITNESS: Sometimes.

Mr. HALL: Is this from your own personal knowledge or not? . . .

The COURT: The witness ought to understand it is from his own knowledge.

The WITNESS: Why, that is my understanding. Perhaps I might be wrong, but that is my understanding.

Q. You were familiar with the ways in which the work was done, the railroad work connected with your train, weren't you? A. Yes, sir; that is as far as my work was concerned.

Q. You were familiar with the way in which the conductor's work was done, weren't you? . . . A. No, I am not familiar with all his work." (Rec. p. 39.)

"Mr. MCCARTHY: Do you want it struck out now?

Mr. HALL: I want to have an opportunity to object. I do not mind this witness stating what he knows himself, but I do object to his stating things that are hearsay.

The COURT: Evidently what the conductor told him

is something that was within the conductor's knowledge, and not within his."

Again, upon Record page 44, the same witness testified:

"Q. Now, as I bring these matters to your attention, is your recollection refreshed as to why Mr. Gillis went into the tower? A. Well, I don't know any more about it than I did then; I presumed he went to the tower to find out where he would put the cars.

Q. That would be the usual thing to do, wouldn't it? A. Yes, sir."

Upon cross-examination the witness testified (Rec. pp. 51 and 52): "I had never gone to the tower and obtained from the yard master permission to go into the Readville yard unless I had an engine alone. Whatever may have occurred between the yard master or the tower man and the conductor is something that I have no personal knowledge of."

"Q. And your testimony as to what may have occurred as to conversation between the conductor and the yard master or the tower man is purely hearsay, or inference? A. Yes, sir.

Mr. MCCARTHY: I pray your Honor's judgment as to that; I suppose that is for the Court.

The COURT: Well, he has answered. The only instance to which that could refer has already been explained fully, where he said he inferred."

This testimony is far from establishing any practice or custom that existed in reference to the entrance or exit from the Readville transfer yard under the circumstances that obtained on the night of this accident. Bartlett had never been to the tower with Gillis; he had never heard

what conversation did take place between Gillis and the yard master.

Even assuming that it was the practice to ascertain from the yard master where to put the cars, it in no way affects the weight of White's statement that he told Gillis that he would line up one of the tracks in front of the office. In effect White did tell Gillis where he was to enter, but he did not specify the precise track. The practice as it existed is well described by White (Rec. p. 30) : — "If a conductor made a request to come into the yard, saying that he wanted to leave cars, I might put him on any of these tracks, any of them at all, cut his engine off here, come back in through here. I might say, 'cut your engine off, go down one of these freight mains, get your train'. If those tracks happened to be clear, I might be able to make some such move as that. As it happened that night, those tracks were probably blocked and I made this move down in here."

Whether any custom of entering the yard existed or not, it in no way reflects upon White's conduct in making sure that track 6 and 10 were clear before he lined up the switches and signals for the train to enter the yard.

Can this Court say that a jury would be permitted to base a verdict against the defendant upon any evidence that White had given a mistaken order to Gillis in respect to the latter's movements in the yard?

An attempt is then made to show that after Gillis had entered the yard White should have sought him out and told him what track he should use in leaving the yard to rejoin his train.

The record shows that it was the duty of Gillis to go to White and learn from him what track should be used in leaving the yard. (Rec. p. 23.) "It is a conductor's duty to report to the yard master as soon as they can after run-

ning in the yard, give him the bills, and receive any instructions the yard master may have for him." (Rec. p. 53, 9, 18, 30, 38.)

No other practice would be consistent with good rail-roading. The yard master had supervision of the yards; he directed the placing of cars upon the various tracks, and he was supposed to know what tracks could be used.

There can be no dispute whatever but that it was to him that Gillis should have applied for instructions. Not only was it necessary for Gillis to ascertain from him the track upon which he could leave, but it was necessary that the conductor should deliver the bills which accompanied the 15 cars that were left in the Readville yard. It was also essential that White should remain in the vicinity of his yard office where he could keep watch of the towers and see that Gillis' movement was not interfered with by any action of the towers. It was essential that White should remain near the yard office in order that he might answer telephone communications from other yards or stations. White simply did what his duties required him to do.

When the string of 15 cars passed him, the middle car was not far from a point opposite the yard office. White, supposing that Gillis was at the rear end of his train where he would be expected, walked to that end and found that Gillis was not there; he then went back "so as to be handy around the yard office". "I didn't go to it, I went near it, so I could answer any telephone or so I could get in touch with the tower in case there was a block. . . . My duty was to hang pretty close to the yard office because I had no clerks, I was working alone at that time." (Rec. p. 30.)

Can the court say upon this evidence that there was a question for the jury to determine whether or not it was White's duty to search out Gillis and give him the neces-

sary information? Or that it was a question of fact as to whether White should not have left his post near the yard office and take other measures to inform Gillis that he must leave the yard by a particular track? In other words, can a jury be permitted to say that White should have assumed that Gillis would not have done his duty in the usual and ordinary manner that was required, namely, to deliver his bills to White and learn from White upon what track he should leave the yard to rejoin his train?

Can a jury be permitted to say that White should have anticipated that Gillis would fail to perform his duty in accordance with the established practice of the yard? Or can it be said that White should have foreseen that Gillis, without taking any precautions to ascertain the exact situation, would attempt to make a movement on a track that was blocked with 18 cars?

The plaintiff, however, evidently proceeding upon the theory that White should have anticipated carelessness on the part of Gillis, or upon the earlier-formed theory that White had given an erroneous direction to Gillis and should therefore correct it, proceeds to suggest various measures that should have been taken by White. For illustration, White is questioned as to his duty in respect to seeing to it that Gillis got out of the yard safely. (Rec. pp. 18, 19.) A rule numbered 823 for yard masters,—“They will be responsible for the proper distribution and placing of cars in the yard limit and for the prompt movement of the cars in and through the yard”,—is offered in evidence, evidently for some purpose, but which is not wholly clear. It is evident that the first part of the rule applies to placing cars by switching crews. The “prompt movement of the cars in and through the yard” applies to the prompt movement of road trains. (Rec. p. 18.) White did not have the responsibility for the prompt movement of Gillis and his men and the cars that he had

charge of. He did have the responsibility of giving Gillis' train a good movement. That meant that White was to keep after the towers and see that signals were not held against him. There are towers at each end of the yard which control the semaphore signals, and an examination of the 6 switch and 10 switch at the northerly end of the plan will show the necessity of keeping the semaphore signal clear for a movement over 6 switch. (Rec. pp. 19, 20, 21.)

A glance at the questions and answers upon pages 13 and 14 of the record will show the attempts that were made by the plaintiff to broaden the scope of White's duties in respect to the movement of Gillis' train. In this connection it should perhaps be noted that the semaphore signals control the use of tracks where trains come out of the yard on to the interlocking of the Providence Division. It should be borne in mind, however, that they protect the interlocking only and that a movement cannot be made from the tracks in the yard to the main line unless the semaphore is at safety; that is to say, that one could not go out on to No. 4, which is a main track, and back on to track 6 over switch 6 unless the semaphore was at safety. (Rec. pp. 32, 33.)

The switches on the track are thrown independently of the semaphore. The semaphore signal is worked in connection with the interlocking iron. (Rec. p. 32.) Unless, however, the semaphore signal showed at safety, Gillis could not go out on the main iron and come back on 6 track. It is now apparent what White meant in speaking of "giving Gillis a good movement".

The yard master is next examined as to his failure to inform the tower men to communicate with Gillis by megaphone and the carrying power of the megaphone at the Readville yard is emphasized by the testimony of police officer Kelley of Hyde Park. (Rec. p. 57.)

This practice is only resorted to in cases of extreme emergency; it is not a safe way to give the information. (Rec. p. 23.) "We don't consider that safe; that information is handed out in a second hand way; we would have to depend on that tower man quoting us properly. . . . I would be held responsible for it. . . . We don't do business that way with them. We do it personally between the conductors and ourselves, unless, in a case of extreme emergency, where we have to depend on it; it is not the general practice." (Rec. pp. 23, 32.)

Can it be seriously contended that the presiding judge was wrong in failing to submit to the jury the question that is involved in the failure on the part of White to seek out Gillis by means of a communication through the tower?

White did not even know that Gillis was at the tower or near the tower. He had gone to the rear of the train and failed to find him there, and naturally he may have inferred that Gillis was toward the head end. Whereabouts he was was a matter of conjecture. For aught he knew Gillis might have been working back from the head end of the train. It was White's duty to remain near the yard shanty and await the coming of Gillis.

The plaintiff suggests that the usual and ordinary course might have proven inconvenient for Gillis. (Rec. p. 25.)

"Q. You expected if he was at the head end that he would come clear down to your office and find out from you what track he would go out on before he had made any movement of his train out of the yard, or his engine?

A. It is his duty to come to me."

The plaintiff then calls the witness' attention to the fact that Gillis, after going to the yard office, would be obliged to go down and throw No. 6 switch. White, as a matter

of fact, did not know where Gillis was, but it is apparent that Gillis on his way back would have met his head brakeman, who presumably was working his way in the direction of the head end setting brakes on the cars, and after Gillis had learned upon what track he was to leave the yard he could have informed his brakeman to throw No. 6 switch.

White is next questioned upon his failure to telephone the tower with directions to have Gillis go out on the main track. (Rec. p. 26.) The answer to that is simple, in that the main tracks are never used when yard tracks are clear and in order to use a main track it would have been necessary to have used track No. 4, which would have been directly against the current of traffic. The westbound trains on the defendant road are operated on tracks 1 and 3; the eastbound trains are operated on tracks 2 and 4; therefore to put Gillis back from tower 234 to tower 180 on track 4 would be running against the current of traffic.

White would have had no right to do that unless it was made under a train order or under flag protection. (Rec. p. 31.) If it was made under a train order, permission would be obtained from the train dispatcher at Boston; if a movement was made under flag protection, it would mean that Gillis or his head end man would have to walk all the way from the shanty to the other tower to protect the engine while it was coming back against the current of traffic. Upon this point the witness is subjected to a long cross-examination under the head of "redirect examination" (Rec. pp. 34, 35, 36), where the meaning of "current of traffic", "train order" and "flag protection" is explained, it is hoped, to the entire satisfaction of the plaintiff.

Upon redirect examination, White is further interrogated as to the use of the megaphone from the tower

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ec. p. 39), his failure to instruct the rear brakeman instead of Gillis (Rec. p. 39), his failure to have gone out the tracks and signalled Gillis with his lantern, even though he did not know that Gillis was returning or intending to return by track 8. (Rec. p. 38.)

Q. You could have gone between tracks 6 and 8, where you had an effective field, and swung up with your lantern? *A.* It wouldn't have done any good there.

Q. Could you have done it? *A.* I could have got out there; it wouldn't do any good.

Q. You could signal the engine? *A.* I could signal the left hand of the engine, but no man on the engine." (Rec. pp. 40, 41.)

White had no idea that Gillis was intending to make any move on track 8. He was simply waiting for Gillis to come to him for instructions and to find out what track was clear for him to go out on. (Rec. p. 41.)

The last attempt that plaintiff's ingenuity can afford is suggested on page 12 of the record, where it was considered important that the testimony of White should remain in the record, although it is an apparent mistake. The testimony of White is as follows: "He got 10 all right; when he climbed through the cars on 8 and did the same thing to 6; found 6, 8 and 10 were clear."

It is perfectly apparent that White did not mean to say that 8 was clear, because he had in the same sentence stated that he had climbed through the cars on 8, and later upon cross-examination stated that it was a mistake, and that what he meant to say was that 6 and 10 were clear. (Rec. p. 33.)

All of the extended examination and cross-examination of Mr. White tended to show that so far as he was concerned he performed his entire duty on the night in ques-

tion, and that he in no way contributed to the unfortunate accident which Gillis sustained.

The plaintiff may argue that there is evidence of negligence on the part of Bartlett, the engineer. It is to be remembered that after Gillis had come from tower 180 he had informed Bartlett that they would go in on 8, and when the engineer called Gillis' attention to the fact that 10 was lined up he was informed by Gillis that "it don't make any difference, we will go in through 10 and come back through 8". (Rec. p. 45.) Then they proceeded through 10 and stopped, as has already been described. Gillis cut off the engine, threw the switch to let them back on 8, and Bartlett went with his engine to the water plug to get water. When the engine was ready to return, Gillis got on the cab and was told by Bartlett that there should be a light on the head end of the tender. Gillis then took a position on the head end of the tender, gave him (Bartlett) a motion to back up and he proceeded slowly at the rate of about 8 miles per hour toward switch No. 8. Gillis had thrown that switch because there was no one else to throw it. It showed green, giving Bartlett the right to go on to 8 track, the switch being set right for that track, and Bartlett continued to watch Gillis, or rather watch the light, until the time of the collision.

Bartlett was performing his duty and cannot be charged with any failure on his part to prevent the collision. By rule 500 (Rec. p. 51) enginemen are directed to obey the orders of the conductor as to starting, stopping and shifting cars; they are directed to obey the conductor as to the general management of the train unless such orders endanger the safety of the train. Conductors by rule 615 (Rec. p. 51) are responsible for all switching movements. By rule 103 (Rec. p. 51) conductors are responsible for the proper position of the switches used by them except where switch tenders are stationed.

While it is perfectly true that Bartlett should have been always vigilant and cautious, making the safety of his train of first importance, still he had a right to rely upon the instruction of Gillis that they would return on 8; he had a right to rely upon the fact that Gillis had thrown the switch for 8; he had a right to rely upon the direction of Gillis when he gave him the motion to back in upon 8 track. Not only had Gillis given a verbal direction that they would go back on 8, but the signal itself at 8 told him it was safe to proceed and Gillis was motioning him while he was upon track 8. He looked ahead, but the night was dark and he did not see the cars. Of course, he didn't expect to find cars there "because I didn't think the conductor would attempt to go down through a track with cars on it". (Rec. p. 46.)

Gillis was in a position to know whether there were cars on track 8 or not. He could have gotten down on the ground and sighted along the rails to see if the switch lights at the other end of the yard showed. Bartlett did not do that because he was on the engine and his attention was upon the conductor, who was on the tender for the purpose of giving him the signals as to moving and as to stopping. (Rec. p. 52.) Bartlett was under the orders of Gillis so far as movements in the yard were concerned. (Rec. p. 52.) It cannot be said that there was any act or omission on the part of Bartlett that caused or contributed to the injuries that Gillis received.

Finally, the plaintiff suggests that Gallagher, no longer employed by the defendant, did something or failed to do something that caused or contributed to the collision. Gallagher had absolutely no knowledge as to what Gillis' plans were. He had received no instructions and did not know upon what track Gillis intended to come out. (Rec. p. 55.) At or about the time of the collision Gillis

had got to the head end of the 15 cars, which would have been about 180 feet north of the yard master's shanty. He dismounted from the cars and sat down on track 6, the engine at that time being down at the water plug. He saw them back in on 8. The plaintiff asks him if he didn't appreciate "that if the engine continued to back down 8 there would be a collision". Answer: "I didn't know where they were going to back down; I didn't know whether they were going to back down 8 or 10." (Rec. p. 55.) He was nearly 500 feet away from the point of collision at the time it happened and he had no reason to assume that Gillis was intending to collide with the cars on 8.

The defendant believes that it has exhausted all the theories which the plaintiff has advanced in support of her contention that there is any evidence that would warrant the jury in finding that anyone connected with the defendant was responsible for the accident except Gillis himself.

Upon the assumption that the jury had a right to disbelieve any of the witnesses, even then upon the evidence most favorable to the plaintiff there is no case. Upon all the evidence introduced, the precise cause of the accident is shown, namely, the direction of Gillis himself to enter track 8.

Great Northern Ry. v. Niles, 240 U. S. 444.

See *Feldberg v. Miller*, 217 Mass. 81.

Neither the defendant nor any of its officers, agents or employees violated any duty that they owed Gillis. His own act was the proximate cause of his injuries. Under such circumstances there can be no recovery.

"Why the deceased, although an experienced and careful conductor, neglected his duty at the Readville transfer yard four times on the night in question is

a matter of conjecture. That he did neglect his duty on that night in four particulars is the fact. He neglected his duty in not reporting to the yard master in his waybills when he had brought his 15 cars to a stop on track 10 in front of the yard master's office. In place of doing that, he rode down on the engine to the switch on the end of track 8. He neglected his duty in the second place in undertaking to use track 8 without permission from the yard master. In the third place, if he was undertaking to use track 8 without permission from the yard master at his own risk, at least he should have examined the track he intended to use without permission to make sure it was clear, and in the fourth place as the engine was backing down on track 8 he was standing at the rear end of the tender to show a light for the tender and he stood there until he was killed by coming in collision with the cars on track 8. It is a fact that he had left his 30 cars on the eastbound passenger track of the Providence division with a New York fast express only thirty minutes behind him. It is also a fact that he had induced the officer at Midway to make up the train and send him off at 3 o'clock when the leaving time of the train was forty minutes past four. From these two facts it seems to be likely that the deceased was in a hurry. Whether his hurry explains his neglect of duty and the accident is a matter of conjecture.

"On the evidence the only person who was negligent was the deceased and the judge was right in directing a verdict for the defendant."

Opinion of Loring, J., Record, p. 69.

Grand Trunk v. Lindsay, 232 U. S. 42.

Ellis v. Louisville R. R., 155 Ky. 745.

Pankey v. Atchison, etc., Ry., 180 Mo. App. 185.

Plaintiff's Assignments of Error.

Assignments of Error 1, 2 and 3. For the reasons above set forth, the Court did not err in ruling that upon all the evidence the plaintiff was not entitled to recover, or in directing a verdict for the defendant upon all the evidence.

Assignment of Error 4. The plaintiff's claim is without merit. The Acts of Massachusetts, 1909, Chapter 394, Section 248, provide as follows:

"A railroad corporation shall keep its books and accounts in the manner prescribed by the Board of Railroad Commissioners and shall at all times submit its books to the inspection of the said Board or of any Committee of the General Court which may be authorized to inspect them, and the Directors shall annually on or before the first Wednesday of September transmit to the said Board a report of their doings for the year ending on the thirtieth day of June preceding, which shall be called the annual return of the railroad, sworn to by them and by the treasurer and the then accounting officer of the corporation. Such return shall state whether any fatal accident or serious injury has occurred to a passenger or other person upon the railroad during the year, and if so, the cause of such accident or injury and the circumstances under which it occurred. . . ."

It was not the intention of the Legislature in passing this statute that the company was to be bound by statements therein in determining its legal responsibility for fatal accidents or serious injuries.

There is nothing in the language of the statute that required the defendant to place the responsibility for injuries received by any person upon the railroad.

The report itself describes the number of the engine, the designation of the train, the fact that fifteen of the cars had been dropped on a particular track in the transfer yard, that a collision had occurred which had caused the death of Gillis, that he was thrown to the ground and instantly killed, and in stating the circumstances described that cars on 8 were flats and were not easily seen. There was absolutely nothing in this statement that in any way tended to contradict or control the testimony that had already been offered by the plaintiff. It was not in any sense an admission on the part of the defendant and the Court plainly had the right to reject it. The most that could be argued by the plaintiff is that it was a question of discretion on the part of the presiding judge.

Matters respecting the remedy, such as form of action, sufficiency of the pleadings and rules of evidence depend upon the law of the place where the suit is brought.

Neale v. Holbrook, 12 Pet. 89.

Central Vermont Ry. v. White, 238 U. S. 507, p. 511.

The point was foreclosed by the stipulation. (Rec. p. 58.)

JOHN L. HALL,
Counsel.

Mr. John L. Hall for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of the court.

Action under the Employers' Liability statute, 35 Stat. 65. Plaintiff in error's intestate, on November 3, 1912, while in the railroad company's service in interstate commerce, was killed, through the negligence, in whole or in part, it is charged, of one of the company's officers, agents or employees.

The defenses of the company were denial of the declaration and averments that the intestate's injuries and death were due to and caused by his own negligence and besides "were the result of acts, conditions and circumstances the happening of which was assumed" by him.

The case was tried to a jury. At the conclusion of the testimony, upon motion of defendant and over the objection and exception of plaintiff, the court ruled that upon all of the evidence the plaintiff was not entitled to recover and directed a verdict for defendant. It was stipulated that the case was to be reported for the determination of the full court and that if the ruling and direction should be held to be right, then judgment was to be entered for defendant. "If the case ought to have been submitted to the jury, then judgment is to be entered for the plaintiff in the sum of forty-five hundred (\$4500) dollars." The case was so reported. The full court reviewed the testimony quite elaborately and concluded from that review that "the only person who was negligent was the deceased and the judge was right in directing a verdict for the defendant," and cited *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444.

That case repeated the established principle that when the evidence justifies it it is competent for a court to direct a verdict for a defendant. The principle is not

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Syllabus.

attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to defer to them. *Baltimore & Ohio R. R. Co. v. Whitacre*, 242 U. S. 169; *Erie R. R. Co. v. Welsh*, 242 U. S. 303.

Judgment affirmed.

GILLIS, ADMINISTRATRIX OF GILLIS, *v.* NEW
YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF
MASSACHUSETTS.

No. 296. Argued March 26, 27, 1919.—Decided April 21, 1919.

In the absence of manifest error, concurrent action of state trial and appellate courts in finding no evidence of defendant's negligence sufficient to go to the jury, in a case under the Federal Employers' Liability Act, will not be reëxamined by this court.

224 Massachusetts, 541, affirmed.

THE case is stated in the opinion.

Mr. James J. McCarthy, with whom *Mr. Daniel M. Lyons* and *Mr. Thomas C. O'Brien* were on the brief, for plaintiff in error.